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EASTERN DISTRICT OF CALIFORNIA
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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID ANTHONY BREAUX,

Petitioner,

v.

ARTHUR CALDERON, Warden of the California State Prison at San Quentin,

Respondent.

_____/

NO. CIV.S-93-0570 DFL DAD DP

FINDINGS AND RECOMMENDATIONS

DEATH PENALTY CASE

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This action, a petition for a writ of habeas corpus challenging a capital conviction and sentence pursuant to 28 U.S.C. § 2254, came before the court for hearing on respondent's motion for summary judgment or to dismiss and petitioner's cross-motion for partial summary judgment. Deputy Attorney General George M. Hendrickson and Supervising Deputy Attorney General Harry J. Colombo appeared on behalf of respondent. Richard C. Neuhoff and Deputy Federal Defender Connie Alvarez appeared on behalf of petitioner. After hearing oral argument, the court took the cross-motions under submission. For reasons explained below, the court will recommend that respondent's motion be granted in part and denied in part, and that petitioner's cross-motion be denied.

FACTUAL OVERVIEW

On June 17, 1984, petitioner robbed liquor store cashier Greg Hardy of $200 at gunpoint. Petitioner forced Hardy into a nearby vehicle and released him several blocks away. Hardy ran back to the liquor store, told his employer and called police identifying and describing petitioner and his car.

Later that day petitioner was seen driving a 1982 maroon Corvette into a gas station with a young woman passenger. While petitioner was pumping gas, an assistant manager saw the young woman at a phone booth mouthing "help me" before petitioner grabbed her by the hand, took her to the car and sped away. The assistant manager wrote down the license plate and called police, who determined that the car was registered to Connie Decker, License No. CONNI 82. Ms. Decker's body was found the next morning in a field that was

surrounded by a chain link fence in Rancho Cordova. It was determined by crime scene investigators that Ms. Decker had been killed at another location the afternoon of June 17, with gunshot wounds to the head identified as the cause of death.

Although petitioner had earlier borrowed another vehicle, he appeared the afternoon of June 17 with Ms. Decker's maroon Corvette and told a companion that he had pulled a gun on a lady at a liquor store and dumped her off at the outskirts of town. Petitioner also told the companion that he did not think the lady would be crying about her car anymore and that he was going to change the license plates. Petitioner had the Corvette, now bearing license plates taken from a laundry truck, the remainder of the day and attempted to pay for gas with Ms. Decker's credit card.

On June 19 police on surveillance approached petitioner near his mother's home. Petitioner ran away to a park clubhouse, barricaded himself in and threatened to shoot. Petitioner refused to surrender during a forty-five minute stand-off and was eventually shot in the arm and leg by police, arrested and taken for treatment at an emergency hospital. A hypodermic injection kit and a .32 caliber automatic pistol later identified as the murder weapon were recovered at the time of petitioner's arrest. After treatment, petitioner purportedly waived his Miranda rights and agreed to talk to a deputy sheriff. Petitioner stated that he had shot up with heroin the afternoon of June 17. He admitted that thereafter he had taken the Corvette at gunpoint for a joyride but contended that Ms. Decker was killed by a "Mexican hitchhiker" he had picked up.

Petitioner claimed that he dropped the hitchhiker and Ms. Decker off to go joyriding and that when he returned, Ms. Decker had been shot and put in a nearby dumpster. He told the deputy that he and the hitchhiker had changed the license plates on the Corvette, shown the car off to family and friends and returned the next day moving the body to the location where it was found. Police searched the identified dumpster, finding the victim's clothing and a bullet casing matching the murder weapon.

At trial the defense case focused solely on the theory that due to heavy cocaine use and lack of sleep petitioner did not intend or premeditate the shooting of Ms. Decker but rather had reacted impulsively and irrationally in a frightened and paranoid mental state that was inconsistent with deliberation and premeditation. In support of this defense they presented testimony from persons who had known petitioner over the years and had witnessed the effects of his drug (cocaine and heroin) use during the relevant time period. The defense also presented evidence of petitioner's drug-induced increasingly irrational behavior in the days leading up to June 17, 1984. Finally, the defense introduced expert testimony in support of its theory that petitioner was acting under the influence of cocaine at the time of the killing and with neither deliberation or premeditation.

The jury convicted petitioner of the murder, robbery and kidnapping for robbery of Connie Decker; the robbery and kidnapping for robbery of Greg Hardy; assault with a deadly weapon on a police officer; and being an ex-felon in possession of a firearm. The jury

also found that the murder was committed under the special circumstances of kidnapping and robbery and that petitioner had personally used a firearm in the commission of the offense.

At the penalty phase the prosecution, through stipulation, established that petitioner had previously been convicted of assaulting a police officer, misdemeanor battery and armed robbery. The defense presented mitigating evidence through the testimony of family and friends of petitioner. Petitioner's father testified, characterizing the family as "very close." The father testified that he had a good relationship with his children although he had left the family in 1976 and knew the children were "unhappy" but did not know why. Petitioner's father also stated that he never knew his son to use drugs.

On the other hand, petitioner's mother testified that her marriage with petitioner's father went through stressful periods, eventually deteriorating, and that she suspected her husband was sexually abusing their daughter. She related that the daughter had run away from home and that petitioner became very angry with his father at that point. Petitioner's sister testified that the father had molested her beginning at age nine and that both she and petitioner began using drugs at an early age as an escape from their father's abuse. She testified that her father had sexually abused her brother Michael and that she suspected he had abused petitioner as well. When, in 1982, she discussed the sexual abuse with petitioner, he became angry and rageful. She recounted that petitioner's abuse of drugs was getting worse at that time. Defense

counsel also presented testimony from a priest who was a family friend in support of petitioner and from a woman who recounted that while she was on a raft trip in 1973, petitioner, who was a stranger to her, jumped into the rapids in a heroic but unsuccessful attempt to help her rescue a friend who was drowning.

The jury returned a sentence of death. Thereafter the state trial court imposed the death sentence and a consecutive sentence of ten years, eight months. On direct appeal the judgment and sentence was affirmed by the California Supreme Court. People v. Breaux, 1 Cal. 4th 281 (1991). Petitioner's petition for rehearing was denied by that court on February 26, 1992. A petition for writ of certiorari was denied by the United States Supreme Court on October 5, 1992.[1] Breaux v. California, 506 U.S. 874 (1992).

PROCEDURAL HISTORY

This case commenced on April 6, 1993, with the filing of a petition and a motion for the court to appoint counsel. On June 7, 1993, respondent filed motions to strike or disregard specified allegations, to dismiss for lack of exhaustion, and to dismiss a specified claim due to procedural bar. On February 28, 1994, the assigned district judge granted respondent's motion to dismiss with respect to those claims identified in the order as unexhausted and denied the motion in all other respects. On August 25, 1994, the action was stayed pending exhaustion of the unexhausted claims in

[1] Petitioner's first state petition for writ of habeas corpus was filed with the California Supreme Court while the direct appeal was pending. That state habeas petition was summarily denied on November 20, 1991.

state court. On July 7, 1995, petitioner submitted to the court an amended petition for writ of habeas corpus, including all claims pleaded in the original petition (both exhausted and unexhausted), plus two new claims, Claims V and W. The court filed the document upon its receipt. However, on August 8, 1995, the court issued an order directing the clerk to "de-file" and lodge the amended petition, stating that the court would take up the question of its filing after the exhaustion of state remedies.

On October 3, 1997, petitioner's counsel filed a letter advising the court that on September 24, 1997, the California Supreme Court had denied his second petition for writ of habeas corpus. On October 10, 1997, the stay of this litigation was lifted. On November 12, 1997, the undersigned issued an order stating that the amended petition was deemed filed. On February 10, 1998, respondent filed a motion for summary judgment and motion to dismiss specified claims in the amended petition. On April 14, 1998, the undersigned issued an order requiring the motion to be addressed in stages, with the first stage limited to the questions of: (1) whether the AEDPA applies to the amended petition or any claims therein; (2) what date should be deemed the effective filing date of the amended petition; (3) exhaustion; and (4) certain aspects of procedural bar.

On June 16, 1999, the undersigned issued findings and recommendations recommending that respondent's motion to dismiss for failure to exhaust and procedural default be denied, that the effective filing of the amended petition be November 12, 1997. The court also recommended that the AEDPA be found inapplicable to the

amended petition in its entirety. In an order filed September 29, 1999, the assigned district judge adopted the conclusions reached in those findings and recommendations, with certain clarifications and exceptions. That order denied respondent's motion to dismiss, determined the date of filing of the amended petition to be November 12, 1997, and found the AEDPA inapplicable to the amended petition in its entirety.

In light of these rulings, on December 29, 1999, respondent filed an alternative motion for summary judgment and motion to dismiss specified claims in the amended petition. On June 21, 2000, petitioner filed opposition to that motion and took the unusual step of filing a cross-motion for summary judgment. Respondent's sweeping motion seeks dismissal or judgment in his favor as to all claims in the amended petition, including the inadequate assistance of counsel claims. In turn, petitioner seeks judgment in his favor as to claims A-E, F (in part), G, H, I, J, K, L, N, O, P, Q, R, S (in part), T, U, V and W (in part).[2]

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[2] As indicated to the parties prior to the filing of these voluminous motions, the undersigned has serious reservations regarding the usefulness of all-encompassing motions for summary judgment in death penalty habeas corpus actions. Every judicial officer to address a capital habeas action struggles with the effective management of the litigation. No matter the procedure followed, one is left with doubt that the action is being optimally managed. Nonetheless, the early filing of a summary judgment motion seeking disposition of all claims appears particularly inefficient. First, the motion is unlikely to dispose of all claims, particularly those raising inadequate assistance of counsel. Thus, as to those claims remaining after the motion is ruled upon, both the parties and the court will address the merits at least twice. Second, unnecessary delay is of concern to all involved in capital cases. Rather than expediting resolution, such summary judgment motions merely bring about additional lengthy delay. Third, counsel for

Below the court will first address the standards for both summary judgment and the granting of habeas relief before turning to the arguments of the parties as to each claim of the amended petition.

SUMMARY JUDGMENT STANDARDS

The Rules Governing Section 2254 Cases in the United States District Courts establish that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." Rule 11, Rules Governing § 2254 Cases (emphasis added). Thus, summary judgment motions have been found appropriate in habeas corpus proceedings. Blackledge v. Allison, 431 U.S. 63, 80 (1977); Clark v. Johnson, 202 F.3d 760, 764-65 (5th Cir. 2000) ("As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases."). Nonetheless, the court is not bound in habeas proceedings to "systematically apply traditional rules

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petitioners, particularly those inexperienced in death penalty habeas litigation, are lured into concentrating on the early-filed motion, while failing to complete the necessary work that the court assumes is being undertaken concurrently. Fourth, to the extent that the cost of capital litigation is a concern to many, such motions drastically increase that cost. In this regard, anyone familiar with the practice of law is aware that extensive briefing in connection with law and motion results in a significant increase in legal fees charged. Fifth, because the law in this area is often unsettled, there is a great risk that the resources expended on the motion will, at least in part, be wasted should the law change prior to the ultimate disposition of the case. This is not to say that there is never a place for summary judgment motions in the effective management of these cases. However, for the reasons stated above, the undersigned will continue to discourage the filing of all-encompassing summary judgment motions in most cases.

governing civil proceedings when to do so would be inconsistent with the overriding purpose of the federal habeas corpus statute." Brown v. Vasquez, 952 F.2d 1164, 1169 (9th Cir. 1991).

Summary judgment is appropriate in a civil case when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Owens v. Local No. 169, 971 F.2d 347, 355 (9th Cir. 1992).

The party moving for summary judgment

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. Indeed, summary judgment should be entered, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders

all other facts immaterial." Id. at 323. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); see also First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968); Ruffin v. County of Los Angeles, 607 F.2d 1276, 1280 (9th Cir. 1979).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); Matsushita, 475 U.S. at 586 n.11; see also First Nat'l Bank, 391 U.S. at 288-89; Strong v. France, 474 F.2d 747, 749 (9th Cir. 1973). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

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In seeking to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." First Nat'l Bank, 391 U.S. at 289. See also T.W. Elec. Serv., 809 F.2d at 630. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) Advisory Committee Note to 1963 Amendment). See also Int'l Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir. 1985).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); see also SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed, Anderson, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, Matsushita, 475 U.S. at 587-88 (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); see also United States v. First Nat'l Bank of Circle, 652 F.2d 882, 887 (9th Cir. 1981). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd,

810 F.2d 898, 902 (9th Cir. 1987). Moreover, a scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact precluding summary judgment. Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000); Summers v. A. Teichert & Son, Inc., 127 F.3d 1150, 1152 (9th Cir. 1997).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 586-87 (citations omitted).

HABEAS CORPUS STANDARDS

As noted above, petitioner filed his original petition prior to the enactment of the AEDPA and pre-AEDPA standards of review therefore govern. See Lindh v. Murphy, 521 U.S. 320, 326 (1997). Under those standards a writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of some transgression of federal law binding on the state courts. See Peltier v. Wright, 15 F.3d 860, 861 (9th Cir. 1994); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)). It is not available for alleged error in the interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085.

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However, "a claim of error based upon a right not specifically guaranteed by the Constitution may nonetheless form a ground for federal habeas relief where its impact so infects the entire trial that the resulting conviction violates the defendant's right to due process." Hines v. Enomoto, 658 F.2d 667, 672 (9th Cir. 1981) (citing Quigg v. Crist, 616 F.2d 1107 (9th Cir. 1980)). See also Lisenba v. California, 314 U.S. 219, 236 (1941); Henry v. Kernan, 197 F.3d 1021, 1031 (9th Cir. 1999). In order to raise such a claim in a federal habeas corpus petition, the error alleged must have resulted in a complete miscarriage of justice. See Hill v. United States, 368 U.S. 424, 428 (1962). See also Henry, 197 F.3d at 1031; Crisafi v. Oliver, 396 F.2d 293, 294-95 (9th Cir. 1968).

State court factual findings are presumed correct unless one of eight enumerated exceptions apply. See 28 U.S.C. § 2254(d)(1994). The state courts' application of law to historical facts is reviewed de novo. Belmontes v. Woodford, 350 F.3d 861, 878 (9th Cir. 2003) (citing Thompson v. Borg, 74 F.3d 1571, 1573 (9th Cir. 1996)).

NEW RULE UNDER TEAGUE V. LANE

With respect to nine of petitioner's claims (A, D, F, K, M, O, P, R & S) respondent argues that, if adopted, petitioner's position would constitute a "new rule" which could not be applied to his case under the Supreme Court's decision in Teague v. Lane, 489 U.S. 288 (1989). In each instance petitioner contests respondent's assertion, arguing that respondent's application of the Teague bar is overbroad. The court finds it appropriate to briefly address this

disputed point before proceeding to a claim-by-claim analysis of the cross-motions.

In Teague the Supreme Court held that new rules of criminal procedure are generally not applicable on habeas review. 489 U.S. at 301, 310; Gonzalez v. Pliler, 341 F.3d 897, 904 (9th Cir. 2003). Thus, "[w]ith few exceptions, the Teague non-retroactivity doctrine prohibits courts from announcing new rules of law in federal habeas proceedings." Hoffman v. Arave, 236 F.3d 523, 537 (9th Cir.), cert. denied, 534 U.S. 944 (2001). However, a decision announces a "new rule" only if it "'breaks new ground or imposes a new obligation on the States or the Federal Government [or] if the result was not dictated by precedent existing at the time the defendant's conviction became final.'" Jones v. Smith, 231 F.3d 1227, 1236 (9th Cir. 2000)(quoting Teague, 489 U.S. at 301). See also Hoffman, 236 F.3d at 537. Thus, "'[t]o determine what counts as a new rule, Teague requires courts to ask whether the rule a habeas petitioner seeks can be meaningfully distinguished from that established by binding precedent at the time his state court conviction became final.'" Hoffman, 236 F.3d at 537 (quoting Wright v. West, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring)). See also Gonzalez, 341 F.3d at 904. Finally, courts assessing whether a decision would announce a "new rule" must survey their own case law for guidance. Graham v. Collins, 506 U.S. 461, 469 (1993); Belmontes, 350 F.3d at 884 ("[W]e have held that circuit court holdings suffice to create a 'clearly established' rule of law under Teague."); Gonzalez, 341 F.3d at 904.

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The requisite legal principles upon which petitioner relies in support of Claims A (coercion of jury verdict), D (juror misconduct), F (denial of discovery with respect to citizen complaints against police officers), K (challenging the consciousness of guilt jury instruction), M (death qualification of the jury), O (petitioner's absence from various court proceedings), P (improper excusing of prospective jurors for bias against the death penalty), R (prosecutor's improper and discriminatory use of peremptory challenges) and S (constitutional challenges to the California death penalty scheme) are, for the most part, clearly established. The question presented by those claims is whether the state courts reasonably applied those well-established principles.

Accordingly, unless otherwise specifically indicated below, the court finds that petitioner's claims are not barred by the holding in Teague. See Wright v. West, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring) ("If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule."); Gonzalez, 341 F.3d at 904; Brown v. Poole, 337 F.3d 1155, 1161 (9th Cir. 2003); Hoffman, 236 F.3d at 538; Torres v. Prunty, 223 F.3d 1103, 1110 (9th Cir. 2000) ("[T]he district court merely applied the rule . . . to a new set of facts.").

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ANALYSIS

A. Coercion of Penalty Phase Verdict

In his first claim petitioner asserts that the trial court's rejection of the jury's declaration of a deadlock in the penalty phase and its order that the jury deliberate further upon learning that the jury was split 10-2, was coercive in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (Am. Pet. at 42.)

The jury trial in petitioner's case commenced on October 7, 1986. (Clerk's Transcript (CT) at 1104.) The jurors were sworn and the taking of evidence with respect to the guilt phase trial commenced on December 1, 1986. (CT at 1289.) On December 18, 1986, the jury was instructed and began their guilt phase deliberations. (CT at 1422.) On December 19, 1986, the jury returned their guilt phase verdicts. (CT at 1451-56.)

The penalty phase commenced on December 22, 1986. (CT at 1457.) On December 29, 1986, the jury was instructed and at 2:35 p.m. commenced deliberations in the penalty phase of the trial. (CT at 1547.) The jury recessed at 4:20 p.m. and returned at 10:00 a.m. the following day to resume deliberations. (Id.) Deliberations continued on December 30 and 31. (CT at 1549-50.)

On January 5, 1987, the jury sent out a note reporting that after taking several polls and discussing the evidence, they were unable to reach a verdict. (CT at 1551; Reporter's Transcript (RT)

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at 7425, 7437.) After conferring with counsel,[3] the trial judge inquired of the foreperson whether with further deliberations there was a chance that the jury might come to a decision. (RT at 7437.) The foreperson expressed a belief that "perhaps" there was a chance that the jury could come to decision with further deliberation. (Id.) Three other jurors were then polled by the trial judge with one stating he believed a verdict could be reached, another stating that perhaps a verdict could result and a third expressing the belief that there was not any chance that further deliberations would resolve the jurors' differences. (RT at 7437-38.) The trial judge then terminated the polling and instructed the jury "to go back once more and resume your deliberations in the matter." (RT at 7438.) The jury resumed their deliberations at approximately 11:30 a.m. (RT at 7444.)

At 1:45 p.m. on January 5, the court received a note from the jury stating that they were "not able to reach a unanimous

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[3] The prosecutor first requested that the trial court request that the jurors resume their deliberations without inquiring into their numerical split out of concern that a reviewing court might interpret such an inquiry as coercive with respect to those in the minority. (RT at 7430-33.) The trial judge rejected the request, stating that he would first determine if the jurors agreed they were deadlocked and that if he inquired as to the split, he would do so in such a way that the jury did not reveal which way the majority was standing. (RT at 7431-32, 7434.) It was defense counsel's request that the court at the outset inquire as to the numerical split and how many votes were cast in favor of death and how many in favor of life without the possibility of parole. (RT at 7435.) The defense request was also denied. (RT at 7436, 7439.)

decision." (RT at 7440; CT at 1551, 1553.)[4] The jury foreperson reported that in the approximately two hours since they last reported to the court, the jury had taken one poll with no change in the vote division. (RT at 7444.) The jurors were polled and each confirmed that they did not believe there was a chance of reaching a penalty phase verdict through further deliberations.[5] (RT at 7444-46.) Upon inquiry by the trial judge that she provide only the numerical split and not reveal the numbers for and against either penalty, the foreperson reported that the numerical split on the last ballot taken was two to ten. (RT at 7446-47.) The trial judge then asked the jury to attempt further deliberations, stating:

> I'm going to ask the jury, regardless of what you said, to attempt to deliberate further.
>
> I'm going to instruct you and remind you once more, however, that both sides are entitled to the individual opinion of each juror and no juror should vote in a particular fashion just because of a majority vote in that fashion or any vote in that fashion.
>
> In other words, your vote shall be an independent individual vote.
>
> However, I'm going to ask you for a short period of time to try once more and see if you think there is a chance of reaching a verdict and,

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[4] Before addressing the jury on this occasion the trial judge expressed concern that he did not wish to inquire into how the jury was split in such a way as to suggest that the minority should give more thought to giving up to the majority but that he also was reluctant to declare a mistrial of the penalty phase after what he viewed as only a day and one half of penalty phase deliberations. (RT at 7442-43.)

[5] One juror answered that he believed the possibility that further deliberations would change the views of any jurors to be "extremely slight at this point." (RT at 7445.)

> well, shortly from now, if (sic) won't be too long from now, I'll call you back in and see where you stand, if any progress has been made.
>
> Thank you.

(RT at 7447.)[6]

Approximately one-half hour after receiving this instruction the jury requested that the guilt phase testimony of three prosecution witnesses be re-read. (RT at 7448-49; CT 1552, 1554.) The requested testimony was re-read to the jury during the afternoon of January 5 and the morning of January 6. At 2:20 p.m. on January 6, 1987, the jury returned a verdict of death. (RT at 7458-60; CT at 1556-58.)

Respondent moves for summary judgment on this claim, arguing that the trial court did not abuse its discretion under California Penal Code § 1140 in failing to declare a mistrial of the penalty phase of petitioner's trial.[7] (Alt. Mot. for Summ. J. at 42-43, 47.) Respondent argues that the jury deliberations were not lengthy in light of the complexity of the case and given the large amount of evidence, including mitigating evidence presented by petitioner. Under these circumstances, respondent asserts, the trial

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[6] After so instructing, the trial judge expressed his intent to call the jury back within an hour and if there was no change to seriously consider declaring a mistrial. (RT at 7448.) He again noted the length of the overall trial, the relatively short deliberation and the fact that he had reminded the jurors of their obligation to vote as individuals. (Id.)

[7] Respondent argues that this claim is an attack on the decision of the trial court and is therefore limited to consideration of the trial court record and is not subject to factual development in this habeas proceeding. (Alt. Mot. for Summ. J. at 43, 46.)

court's refusal to declare a mistrial was not coercive and was within the court's properly exercised discretion. (Id. at 51-53 (citing Illinois v. Somerville, 410 U.S. 458 (1973), and Rodriguez v. Marshall, 125 F.3d 739 (9th Cir. 1997).)

Petitioner not only opposes respondent's motion for summary judgment as to this claim but also moves for summary judgment in his own favor. (Opp'n & Cross-Mot. for Summ. J. at 62-63.) Petitioner contends that the trial judge's ordering of further deliberations after unequivocally being informed that the jury was unable to reach a penalty phase verdict was inherently coercive under the totality of the circumstances. In this regard, petitioner argues that the record reflects that the jury had deliberated for at least thirteen and one-half to nineteen hours, approximately three times longer than was consumed hearing the penalty phase testimony, when it sent out the second note reporting that it was deadlocked. (Id. at 71.) Petitioner argues that by that point the jurors had already followed the trial court's first directive to deliberate further. (Id.) After doing so, the jury took another vote with the same result as the previous one. (Id.) Petitioner notes that all of the jurors unequivocally informed the trial judge that further deliberations would not be fruitful. (Id. at 72.) The judge then asked the foreperson to reveal the numerical split and, upon learning that it was 10 to 2, immediately ordered deliberations to resume and directed the jurors to try and make "progress" in "a short period of time." (Id.) Petitioner notes that although the trial judge advised the

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jury he would shortly call them back in to see if any progress had been made, he never did so. (Id. at 75.)

Petitioner argues that inquiring into the jury's numerical division was inherently coercive. (Id. at 72 (citing Brasfield v. United States, 272 U.S. 448, 450 (1926), and Lowenfield v. Phelps, 484 U.S. 231, 239 (1988).) Petitioner asserts that, given the totality of the circumstances, the trial judge sent a clearly coercive message that the two holdout jurors should change their votes. (Id. at 72-76.) Finally, petitioner argues that because the penalty phase decision is inherently more subjective than a guilt phase determination, any coercion of jurors in the minority by the trial judge must be subject to special scrutiny. (Id. at 75-76.)

The factual basis for this claim is fully developed in the record before the court and has been fairly summarized above.[8]

Whether to declare a mistrial is normally left to the sound discretion of the trial court, which is in the best position to assess the likelihood of a jury being able to reach a verdict. Rodriguez v. Marshall, 125 F.3d 739, 748 (9th Cir. 1997), overruled in part on other grounds by Payton v. Woodford, 299 F.3d 815 (9th Cir. 2002). Of course, a criminal defendant has a constitutional

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[8] Contrary to respondent's claim, to the extent petitioner has presented additional evidence in support of this claim, that evidence may properly be considered by this court. That evidence is limited simply to declarations which clarify the record regarding the length of penalty phase jury deliberations prior to the court's receipt of the jury's notes reporting a deadlock. While the length of deliberations is a relevant consideration, whether those deliberations precisely spanned "approximately eight," thirteen and one-half, or nineteen hours does not affect the resolution of the issue before this court.

right to an uncoerced jury verdict. Lowenfield v. Phelps, 484 U.S. 231, 241 (1988). As the Ninth Circuit Court of Appeals has observed:

> Whether the comments and conduct of the state trial judge infringed defendant's due process right to an impartial jury and fair trial turns upon whether "the trial judge's inquiry would be likely to coerce certain jurors into relinquishing their views in favor of reaching a unanimous decision."

Jiminez v. Myers, 40 F.3d 976, 979 (9th Cir. 1994) (quoting Locks v. Sumner, 703 F.2d 403, 406 (9th Cir. 1983)). Whether a court's actions were coercive must be assessed in light of the context and under all of the circumstances of the case. Lowenfield, 484 U.S. at 237; Jiminez, 40 F.3d at 979-80; Locks, 703 F.2d at 406-07. However, a state trial court's inquiry into the numerical split of the jury absent other circumstances of coercion does not deprive a defendant of due process. Jiminez, 40 F.3d at 980; Locks, 703 F.2d at 407; see also Lowenfield, 484 U.S. at 240 n.3 (citing cases).[9] Finally, in determining whether a supplemental jury instruction is improperly coercive it is appropriate to consider: (1) the form of the jury charge; (2) the length of deliberation following the charge; (3) the total time of deliberation; and (4) other indicia of coerciveness or pressure. Weaver v. Thompson, 197 F.3d 359, 366 (9th Cir. 1999) (citing United States v. Wills, 88 F.3d 704, 717 (9th Cir. 1996)).

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[9] The rule is different on direct review of a federal criminal conviction, where such an inquiry into the numerical division of the jury requires reversal. See Brasfield v. United States, 272 U.S. 448 (1926). However, that per se rule rests on the supervisory power of the court rather than upon constitutional grounds. See Lowenfield, 484 U.S. at 239-40; Jiminez, 40 F.3d at 980 n.3.

Considering all the circumstances in this case, the court concludes that the state trial judge's actions did not deprive petitioner of due process. When the jury first indicated that it was not able to come to a unanimous penalty phase decision, the trial court merely inquired as to whether further deliberations might prove helpful. Three of the four jurors polled indicated in one way or another that further deliberations might assist in resolving the juror's differences. Certainly, the trial judge committed no error in directing the jury to resume their deliberations at that point.

It was little more than two hours later[10] when the jury communicated that they were unable to reach a unanimous penalty phase decision. Upon inquiry, the trial court learned that only one poll had been taken by the jury since they last appeared in court, albeit with the same result as before. The court polled the entire jury for the first time and was told that none of the jurors believed that additional deliberations would assist. Only then did the court inquire as to the numerical split of the jury. Upon learning that the split was two to ten the trial judge asked the jury to attempt further deliberations but specifically instructed them that both sides were entitled to the individual opinion and vote of each juror and reminded them that no juror should vote in a particular fashion just to succumb to the majority. The trial judge told the jury that he would call them back in shortly to see if any progress had been made. This proved to be unnecessary when only one-half hour later

[10] It appears that during that two hours and fifteen minutes the jury may well have had lunch. (RT at 7444.)

the jury requested that the testimony of three guilt phase prosecution witnesses be re-read, thus indicating that deliberations were once again progressing. The verdict was returned the afternoon of January 6 after the completion of the re-reading of the requested testimony.

As recognized above, however, the state trial court's inquiry into the numerical split of the jury does not deprive a defendant of due process. Nor do the other surrounding circumstances establish coercion in this case. The trial judge took precaution to avoid learning whether the jury was ten to two in favor of a death verdict or a verdict of life without the possibility of parole. He did not attempt to identify the jurors in the minority. His instruction neither urged the jurors to reach a unanimous verdict nor criticized any position taken by a juror. The trial judge did not send a message to the jury that the jurors in the minority should succumb to the will of the majority to reach a verdict. In fact, he specifically instructed the jury to the contrary. This is not a case in which upon an announced impasse the trial judge inquired of the number of ballots taken, learned of movement over time in those ballots from a division of seven to five to eleven to one and then, without cautionary instruction that the minority should not succumb to the majority for the sake of reaching a verdict, directed the jury to resume deliberations in light of the substantial movement. See Jiminez, 40 F.3d at 980-81.

Petitioner takes issue with respondent's estimate of the length of penalty phase deliberations, arguing that at the point the

jury announced an impasse deliberations had gone on at least three times longer than the penalty phase of the trial itself. The argument is too narrowly focused and misses the mark. The jury in petitioner's case heard eleven days of testimony in the guilt phase of the trial, followed by closing arguments that spanned two days. The fact that the defense penalty phase case included six witnesses testifying for approximately four hours over the course of only two day (RT at 7005-7148) is not dispositive. When the jury resumed their penalty phase deliberations on January 5 they asked for the re-reading of testimony of prosecution guilt phase witnesses who had testified on December 1, 3, 11 and 12. Given the overall length of the trial the jury's penalty phase deliberations were not particularly lengthy. Consideration of this factor does not lead to the conclusion that the trial court's action were coercive. Moreover, the jury did not immediately return a verdict after being asked by the court to return to their deliberations on January 5. Rather, despite the fact that it was suggested by the court that their deliberations might end if no progress was made, they requested the re-reading of the testimony noted above, deliberated further and did not return their penalty verdict until the following day at 2:20 p.m. This set of circumstances indicates that the verdict was not the product of coercion. See United States v. Hernandez, 105 F.3d 1330, 1334 (9th Cir. 1997).

Finally, petitioner argues that because the jurors' penalty phase decision is inherently moral and not factual, the actions of the trial court in directing the jury to deliberate further should be

subject to particular scrutiny for coercion. Petitioner cites no authority for this heightened standard of review. Even if the actions of the trial court were reviewed under the suggested standard, for the reasons set forth above, this court concludes that under these circumstances no juror on the panel would have felt pressured to reach any verdict.

Accordingly, respondent's motion for summary judgment should be granted and petitioner's cross-motion denied as to this claim.

B. Prosecutorial Misconduct During Closing Argument

As transcribed, the prosecutor's opening argument to the jury at the conclusion of the penalty phase of the trial spanned approximately twenty-eight pages. After addressing the law, the jury instructions, and the penalty phase testimony, the prosecutor turned to the 1984 murder for which the petitioner had just been convicted. (RT at 7326-28.) At that point the prosecutor argued to the jury:

> And you know what the defendant did in 1984 as to Greg Hardy and as to Connie Decker. As he took the victims from their locations around, as he moved Greg Hardy around at gunpoint, the defendant displayed for you a degree of callousness that I hope you never see again. As he took Connie Decker around Sacramento, he displayed for you a degree of callousness, a baseness that I hope you never see again. What do you think, honestly, now? You know, what do you think about the mitigating circumstances of the defendant? Specifically, what do you think about sympathy for someone who commits those crimes, who commits things like that, who kills without any justification for it? I'm not talking about legal justification only. I'm talking about moral justification. Any excuse whatsoever. Anything at all that kind of makes it, although not a defense, makes the defendant

> less culpable in some way? What is it? There isn't. There simply isn't. It's despicable what the defendant did. There is no way around it, and it's not -- it's not because I say it and it's not because you see it that way, it's simply because that's the way he did it. It's simply the way he did his crimes.
>
> * * *
>
> After he killed Connie Decker, you saw at no time under any circumstance through any witness, any expression by the defendant of remorse for what he did, a human feeling for what he did.

(RT at 7327-29.)[11] Later, just before concluding, the prosecutor argued:

> It was simply consistent, totally consistent with the defendant, totally consistent with his actions, with his actions of violence and disregard for everyone and everything He basically does not care. That's all. He really, simply does not care.

(RT at 7330.)

At the next recess, petitioner's trial counsel moved for a mistrial on the grounds that the prosecutor's "lack of remorse argument" was: erroneous as a matter of law, untrue based upon information provided to the defense by the prosecution, an improper comment on petitioner's reliance on his Fifth Amendment right not to testify and made without the required notice to the defense. (RT at 7357-59.) In response, the prosecutor argued that he was commenting

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[11] Defense counsel objected following this comment, requesting to be heard outside the presence of the jury after the prosecutor's argument. (RT at 7329.) Immediately after the objection the prosecutor continued with his argument, focusing on the petitioner's actions immediately after the killing.

solely on the evidence at trial, focusing on the manner in which the killing was carried out and on petitioner's actions immediately following the murder. (RT at 7359-60.) The prosecutor also questioned whether petitioner was ever remorseful. (Id.) The trial court denied the motion for a mistrial finding that the prosecutor's comment was a fair comment on the evidence admitted at trial and finding that the facts and circumstances of the crime were at issue rather than whether petitioner lacked remorse. (RT at 7361-62.) On appeal the California Supreme Court rejected petitioner's position, finding the lack of notice argument to be without merit as a matter of state law and concluding that the comment was not an improper reference to petitioner's failure to testify but rather was simply a proper reference to petitioner's callous behavior after the killing based upon the evidence presented at trial. People v. Breaux, 1 Cal. 4th 281, 312-14 (1991).

Before this court petitioner claims that the prosecutor engaged in prejudicial misconduct by arguing to the jury a fact that the prosecutor knew to be untrue. In this regard, petitioner asserts that a police report provided to the defense by the prosecution prior to trial established that petitioner had expressed remorse for the killing. In that report, a sheriff's deputy stated that while awaiting his arraignment on the murder charge in the medical detention facility within the Sacramento Medical Center, petitioner became upset, his face turned red and with tears in his eyes he said:

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> I'm real sorry about the girl, that she died and her parents too. [five second pause] All these people who are here, the trouble, I'm real, real sorry.

(Am. Pet., Ex. A.)

Petitioner asserts that in addition to constituting misconduct, the prosecutor's actions also violated petitioner's right to a fair trial because no notice was given, as required under state law, of the intent to rely on lack of remorse as an aggravating factor. Petitioner also argues that reliance on lack of remorse as an aggravating factor is not authorized by California law. Finally, petitioner claims that because there was no affirmative evidence of his lack of remorse, the prosecutor's argument improperly penalized petitioner for the exercise of his constitutional right not to testify in his own defense. See Griffin v. California, 380 U.S. 609 (1965).

Respondent moves for summary judgment on this claim. In doing so respondent disputes neither the actual closing argument made by the prosecutor nor the police report of Deputy Clegg reflecting petitioner's statement just prior to his arraignment. Rather, respondent argues that he is entitled to judgment as a matter of law because: (1) the state courts' determination that the prosecutor's comment related only to the evidence of events surrounding the murder and was not an assertion that petitioner had never expressed remorse, is a factual finding that must be deferred to; (2) the comment was not improper because the prosecutor could have believed that petitioner's statement in Deputy Clegg's presence was not a genuine

expression of remorse; (3) the argument was not an improper comment on petitioner's right to remain silent; and (4) in any event, the prosecutor's statement neither infected the trial with unfairness nor had a substantial and injurious effect on the jury's verdict in light of the evidence.

Petitioner also moves for summary judgment in his favor on this claim. He argues that the prosecutor's argument was knowingly false in light of Deputy Clegg's report, constituted Griffin error and was improperly made without notice. Citing a number of studies on the subject, petitioner argues that lack of remorse is the single most important factor in a jury's decision to impose the penalty of death over life without the possibility of parole. Thus, he concludes, given the closeness of the jury's vote on the penalty verdict it cannot be said that the error had no substantial or injurious effect.

A criminal defendant's due process rights are violated when a prosecutor's misconduct renders a trial fundamentally unfair. Darden v. Wainwright, 477 U.S. 168, 181 (1986). However, such misconduct does not, per se, violate a petitioner's constitutional rights. Jeffries v. Blodgett, 5 F.3d 1180, 1191 (9th Cir. 1993) (citing Darden, 477 U.S. at 181, and Campbell v. Kincheloe, 829 F.2d 1453, 1457 (9th Cir. 1987)).

Claims of prosecutorial misconduct are reviewed "'on the merits, examining the entire proceedings to determine whether the prosecutor's [actions] so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Johnson v.

Sublett, 63 F.3d 926, 929 (9th Cir. 1995) (citation omitted). See also Greer v. Miller, 483 U.S. 756, 765 (1987); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Turner v Calderon, 281 F.3d 851, 868 (9th Cir. 2002). Relief on such claims is limited to cases in which the petitioner can establish that prosecutorial misconduct resulted in actual prejudice. Johnson, 63 F.3d at 930 (citing Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993)); see also Darden, 477 U.S. at 181-83; Turner, 281 F.3d at 868. Put another way, prosecutorial misconduct violates due process when it has a substantial and injurious effect or influence in determining the jury's verdict. See Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir. 1996). Finally, it is the petitioner's burden to state facts that point to a real possibility of constitutional error in this regard. See O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990).

1. Lack of Notice Under State Law

Petitioner is not entitled to relief to the extent he claims that he was not provided notice of the prosecution's intent to rely on lack of remorse as an aggravating factor in violation of California Penal Code § 190.3. On direct appeal the California Supreme Court rejected this contention, concluding that under § 190.3 a defendant is entitled to pretrial notice of evidence to be presented in aggravation, not to notice of argument to be presented. Breaux, 1 Cal. 4th at 313. Of course, federal habeas relief is not available for alleged error in the interpretation or application of state law. See Estelle, 502 U.S. at 67-68.

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2. Griffin Error

Next is the question of whether the prosecutor's remark violated Griffin by using language that was intended to comment on petitioner's failure to testify or was of such a character that the jury would naturally and necessarily take it to be such. As noted, the California Supreme Court rejected this claim on direct appeal, concluding that the comment was not a clear reference to petitioner's failure to testify and, when considered in the context of the prosecutor's closing argument as a whole, was simply a reference to his callous behavior after the killing. Breaux, 1 Cal. 4th at 313.

The Fifth Amendment prohibits a prosecutor from commenting to the jury regarding the defendant's failure to testify at trial. See Griffin, 380 U.S. at 615. This rule applies equally to both the guilt phase and penalty phase of a trial. Estelle v. Smith, 451 U.S. 454, 462-63 (1981); Beardslee v. Woodford, 327 F.3d 799, 825 (9th Cir. 2003); see also Lesko v. Lehman, 925 F.3d 1527, 1544 (3d Cir. 1991). A prosecutorial comment in argument runs afoul of the rule "if it is manifestly intended to call attention to the defendant's failure to testify, or is of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." Lincoln v. Sunn, 807 F.2d 805, 809 (9th Cir. 1987). However, relief is to be granted on such a claim only "'where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis for the conviction, and where there is evidence that could have supported acquittal.'" Beardslee, 327 F.3d at 825 (quoting Lincoln, 807 F.2d at 809). See also Jeffries, 5

F.3d at 1192. Conversely, relief will not be granted where the prosecutorial comment is a single, isolated incident, does not stress the inference of guilt from silence as a basis for the verdict and is followed by a curative instruction. Lincoln, 807 F.2d at 809.

The comment by the prosecutor in his penalty phase argument upon which this claim is based was brief, isolated and not of such a character that the jury would necessarily take it to be a comment on the failure to testify. Certainly, the comment did not stress defendant's failure to testify as a basis for a verdict of death. Under these circumstances, the prosecutor's comments do not justify the granting of relief for Griffin error. See Beardslee, 327 F.3d at 825.

3. False Allegation of a Lack of Remorse

Finally, petitioner argues that in his penalty phase argument the prosecutor stated that petitioner had never expressed remorse, knowing that the statement was untrue in light of Deputy Clegg's report. This question is more difficult than those addressed immediately above. The California Supreme Court first avoided the issue by finding that the Clegg report was not in the record and thus not properly before the court on appeal and then addressed it by suggesting that the "prosecutor's comment was clearly limited to the evidence presented at trial."[12] Breaux, 1 Cal. 4th at 314.

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[12] This suggestion was supported by reference only to the prosecutor's subsequent explanation provided in opposing the motion for a mistrial. Breaux, 1 Cal. 4th at 314.

The undersigned does not find the comment in question to be so clearly limited. The precise words spoken were somewhat broad - "you saw at no time under any circumstances through any witness, any expression by the defendant of remorse for what he did." (RT at 7329.) In addition, in responding to the defense mistrial motion the prosecutor argued in part that he believed that petitioner had not been remorseful and instead may merely "have felt sorry for himself having been caught." (RT at 7359-60.) On the other hand, considered in the context of the entire argument, the comment was not of such a specific character that the jury would necessarily have taken it to be an assertion that petitioner had never expressed remorse to anyone. See United States v. Robinson, 485 U.S. 25, 33 (1988) ("[P]rosecutorial comment must be examined in context. . . ."); Donnelly, 416 U.S. at 647 ("[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations."); Williams v. Borg, 139 F.3d 737, 745 (9th Cir. 1998)(quoting Donnelly, 416 U.S. at 647). In this regard, both immediately prior to and after the comment in question the prosecutor was addressing the manner in which petitioner carried out his crimes of conviction. (See RT at 7326-30.) Moreover, the reference to "through any witness" in the challenged comment focused somewhat on the evidence adduced at trial.

In considering claims of prosecutorial misconduct involving allegations of improper argument the court is to examine the likely

effect of the statements in the context in which they were made and determine whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Turner, 281 F.3d at 868; Sandoval v. Calderon, 241 F.3d 765, 778 (9th Cir. 2001), cert. denied, 534 U.S. 943 (2001); see also Donnelly, 416 U.S. at 643; Darden, 477 U.S. at 181-83.

In this case, the challenged comment was brief, isolated and somewhat vague in that it could have been taken to refer only to petitioner's conduct at the time of the killing. While lack of remorse is no doubt a potentially important factor in a jury's decision to impose the penalty of death, the defense had available to it in pretrial discovery Deputy Clegg's report and could have presented evidence at trial of petitioner's statement just prior to his arraignment had counsel believed it to be strong evidence on the issue of remorse. For whatever reason, defense counsel elected not to do so. Considered in this context the undersigned concludes that the prosecutor's brief remark regarding petitioner's failure to express remorse for the killing did not render the penalty phase of the trial fundamentally unfair. Accordingly, respondent's motion for summary judgment should be granted as to this claim.

C. Ineffective Assistance of Trial Counsel (Claims C, T & W)

In Claim C, petitioner alleges that he was denied his constitutional right to the effective assistance of counsel because his trial counsel failed to: (1) introduce available and substantial evidence of his remorse for the killing; (2) investigate and present

evidence regarding his use of steroids and Ritalin shortly before the killing; (3) adequately investigate his background, history and mental condition; and (4) consult and present testimony from appropriate experts regarding the above. (Am. Pet. at 54-60.)

In Claim T, petitioner alleges that his trial counsel was ineffective in failing to: (1) undertake reasonably adequate voir dire, and (2) adequately use the defense allotment of peremptory challenges. (Am. Pet. at 118-20.)

In Claim W, which incorporates the allegations of Claim C, petitioner alleges that ineffective assistance of trial counsel resulted in the denial of his constitutional rights in that his lawyers failed to: (1) have appropriate diagnostic testing of petitioner conducted; (2) consult with mental health experts specializing in child abuse and trauma; (3) conduct an adequate investigation into his background; and (4) discover evidence favorable to the defense.

Below, the court will first address the legal standards applicable to these ineffective assistance of counsel claims before turning to the arguments advanced by the parties in support of their cross-motions for summary judgment as to these claims. As explained below, in the end the undersigned concludes that summary judgment in favor of either party on the ineffective assistance claims is premature.

1. Strickland Standard

To support a claim of ineffective assistance of counsel, a petitioner must first show that, considering all the circumstances,

counsel's performance fell below an objective standard of reasonableness. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984). After a petitioner identifies the acts or omissions that are alleged not to have been the result of reasonable professional judgment, the court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally, competent assistance. Id. at 690; Wiggins v. Smith, ___ U.S. ___, 123 S. Ct. 2527, 2535 (2003). Second, a petitioner must establish that he was prejudiced by counsel's deficient performance. Strickland, 466 U.S. at 693-94. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id. See also Williams v. Taylor, 529 U.S. 362, 391-92 (2000); Laboa v. Calderon, 224 F.3d 972, 981 (9th Cir. 2000).

In assessing an ineffective assistance of counsel claim "[t]here is a strong presumption that counsel's performance falls within the 'wide range of professional assistance.'" Kimmelman v. Morrison, 477 U.S. 365, 381 (1986) (quoting Strickland, 466 U.S. at 689). There is in addition a strong presumption that counsel "exercised acceptable professional judgment in all significant decisions made." Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990) (citing Strickland, 466 U.S. at 689). However, that deference "'is predicated on counsel's performance of sufficient investigation and preparation to make reasonably informed, reasonably sound

judgments.'" Williams v. Woodford, 306 F.3d 665, 711 (9th Cir. 2002) (quoting Mayfield v. Woodford, 270 F.3d 915, 927 (9th Cir. 2001)(en banc)).

Defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. "This includes a duty to . . . investigate and introduce into evidence records that demonstrate factual innocence, or that raise sufficient doubt on that question to undermine confidence in the verdict." Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001) (citing Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir. 1999)). In this regard, it has been recognized that "the adversarial process will not function normally unless the defense team has done a proper investigation." Siripongs v. Calderon (Siripongs II), 133 F.3d 732, 734 (9th Cir. 1998)(citing Kimmelman, 477 U.S. at 384). Therefore, counsel must, "at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." Hendricks v. Calderon, 70 F.3d 1032, 1035 (9th Cir. 1995)(quoting Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994)(internal citation and quotations omitted). On the other hand, where an attorney has consciously decided not to conduct further investigation because of reasonable tactical evaluations, his or her performance is not constitutionally deficient. See Siripongs II, 133 F.3d at 734; see also Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998); Hensley v. Crist, 67 F.3d 181, 185 (9th Cir. 1995). "A decision not to investigate thus 'must be directly assessed for reasonableness in

all the circumstances.'" Wiggins, 123 S. Ct. at 2541 (quoting Strickland, 466 U.S. at 691). See also Kimmelman, 477 U.S. at 385 (counsel "neither investigated, nor made a reasonable decision not to investigate"); Babbitt, 151 F.3d at 1173-74. A reviewing court must "examine the reasonableness of counsel's conduct 'as of the time of counsel's conduct.'" United States v. Chambers, 918 F.2d 1455, 1461 (9th Cir. 1990) (quoting Strickland, 466 U.S. at 690). Furthermore, "'ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case.'" Bragg, 242 F.3d at 1088 (quoting Eggleston v. United States, 798 F.2d 374, 376 (9th Cir. 1986)). See also Hayes v. Woodford, 301 F.3d 1054, 1070 (9th Cir. 2002).

In the context of a penalty phase trial, counsel has been found ineffective when he or she "fails to conduct more than a cursory investigation of a defendant's background and makes no attempt to humanize him before the jury." Babbitt, 151 F.3d at 1176 (citing Siripongs v. Calderon (Siripongs I), 35 F.3d 1308, 1316 (9th Cir. 1994))).[13] "To perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present[] and explain[] the significance of all the available [mitigating]

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[13] Of course, "the duty to investigate and prepare a defense is not limitless: it does not necessarily require that every conceivable witness be interviewed." Hendricks, 70 F.3d at 1040 (citation and quotation omitted). When the record clearly shows that the lawyer was well informed of the relevant facts and circumstances and the defendant fails to state what additional information would be gained by the discovery he now claims was necessary, an ineffective assistance claim fails. Eggleston, 798 F.2d at 376.

evidence.'" Mayfield, 270 F.3d at 927 (quoting Williams, 529 U.S. at 393, 399).

The court will now turn to the cross-motions with respect to petitioner's specific claims of ineffective assistance of counsel.

2. Arguments of the Parties

Respondent prefaces his argument by stating that if his motion for summary judgment is denied as to this claim, an evidentiary hearing is necessary to resolve the truth of petitioner's allegations. Respondent then argues that petitioner's trial counsel was not ineffective in failing to introduce available evidence of petitioner's expression of remorse for the killing to Deputy Clegg, family members and a Catholic priest since those expressions of remorse would ring hollow in light of the callousness of petitioner's conduct and would have opened the door to comparisons between petitioner's expression of remorse and his actual conduct. Respondent also argues that counsel did not render deficient assistance in failing to present evidence of petitioner's use of steroids and Ritalin prior to the killing because there is no evidence with respect to the amount of those substances petitioner ingested and, in any event, counsel fully explored petitioner's use of cocaine and heroin and the effects of that drug usage at trial. Likewise, respondent contends that petitioner's counsel did not render ineffective assistance in the jury selection process but rather made reasonable tactical decisions both in questioning the prospective jurors and in exercising the defense challenges. Finally, respondent contends that petitioner has failed to establish

that the alleged inadequacy of performance on the part of counsel prejudiced him in any way.[14]

In opposing respondent's motion for summary judgment and arguing that judgment should be entered in his favor petitioner first argues that there is strong evidence that counsel provided ineffective assistance in failing to introduce available evidence of petitioner's expressions of remorse for the killing. In this regard, petitioner points to the declaration of attorney James S. Thomson stating the expert opinion that defense counsel's performance was deficient under prevailing professional norms in failing to introduce Deputy Clegg's testimony into evidence on the critical issue of remorse. (Opp'n & Cross-Mot. for Summ. J., Ex. D.) Petitioner also relies upon the declarations of his trial counsel, both of whom state that they do not recall ever considering calling Deputy Clegg to testify, that they had no tactical reason for failing to call him as a witness since they knew a lack a remorse would weigh heavily with the jurors and that if they were to make the decision today they would call Deputy Clegg as a penalty phase witness as well as the other available witnesses on the issue of petitioner's remorse. (Opp'n & Cross-Mot. for Summ. J, Exs. E & F.) Petitioner contends that trial counsel's deficiencies in this regard obviously undermine

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[14] Respondent also asserts that petitioner's contention that the California Supreme Court's refusal to authorize funds for habeas investigation prevented him from investigating and fully pursuing this claim and in violation of his constitutional rights fails to state a cognizable claim.

confidence in the death penalty verdict in light of the importance of evidence of remorse and the closeness of the jury's penalty decision.

Petitioner also contends that his trial counsel was ineffective in failing to discover available evidence regarding his use of steroids and Ritalin and therefore failed to prepare the defense experts to render opinions regarding the combined effects of these drugs along with cocaine. In this regard, petitioner points to: (1) the declarations of witnesses who could have testified to petitioner's steroid use; (2) the declarations of trial counsel stating that they were aware of petitioner's steroid use and inquired of experts regarding that use but did not obtain an opinion regarding the effects of steroids upon one's mental state either alone or in conjunction with the other drugs and that although they became aware during trial that petitioner also used Ritalin prior to the killing they did not seek or obtain an expert opinion regarding the effect the Ritalin might have had on petitioner; (3) the declaration of the Strickland expert, attorney Thomson, stating that reasonably competent counsel acting under prevailing professional norms would have presented expert testimony regarding the effect that steroids and Ritalin taken before the killings had upon petitioner; and (4) the declarations of Ronald Siegel, Ph.D., a psychopharmacologist, stating that experts regarding the effect of various steroids and Ritalin on the mental state of petitioner were available at the time of petitioner's trial and his preliminary opinion that the combined use of steroids, heroin and cocaine impaired petitioner's cognitive abilities to the point where his thinking was confused or suspended

resulting in his commission of this murder. (Opp'n & Cross-Mot. for Summ. J., Exs. AAA, PP, QQ, RR, YY, D, E, F & G.)

Petitioner also argues in summary fashion that his trial counsel rendered ineffective assistance by failing to conduct an adequate voir dire of the prospective jurors and in failing to use still available peremptory challenges to excuse two jurors that the defense had unsuccessfully challenged for cause. (Opp'n & Cross-Mot. for Summ. J. at 151-56.)

Finally, petitioner contends that counsel was deficient in failing to investigate and present evidence regarding the sexual abuse suffered by petitioner as a child and the correlation between that sexual abuse and his subsequent use of drugs and in failing to prepare and present a proper social history of petitioner that would have revealed evidence of these mitigating factors.

In reply respondent focuses on the declarations of petitioner's trial counsel, characterizing them as "simply not believable" in their averments that they overlooked presenting evidence of petitioner's remorse and had no tactical reason for failing to do so. With respect to petitioner's showing that trial counsel provided inadequate assistance in failing to present evidence of petitioner's use of steroids and Ritalin prior to the killing and expert testimony regarding the effects of that usage, respondent tellingly contends that the matters stated in the declarations submitted by petitioner are the subject of dispute. Respondent also argues that the decision not to present this evidence but to instead focus on petitioner's heroin and cocaine use was a tactical decision

by counsel. Finally, respondent argues that any claim that petitioner was abused sexually as a child is speculative and that, in any event, evidence of such abuse as well as preparation of a complete social history would not have had any significant effect on the jury verdict.

In reply, petitioner argues that summary judgment must be granted in his favor on these ineffective assistance of counsel claims due to respondent's failure to present evidence in opposition to his cross-motion for summary judgment. Specifically, petitioner contends that no disputed issue of material fact is raised merely by respondent stating that trial counsel's declarations are not believable or that the matters set forth in petitioner's declarations are the subject of dispute. He also notes that the assertion that petitioner was sexually abused as a child is not speculative but rather is supported by a preliminary showing in the form of the declaration from Dr. June M. Clausen, Ph.D. (See Opp'n & Cross-Mot. for Summ. J., Ex. AAA.)

3. Analysis

Petitioner's ineffective assistance of counsel claims are not susceptible to resolution on motion for summary judgment. By way of the declarations of his prior counsel, a Strickland expert and medical and psychiatric experts, petitioner has presented evidence in support of his claim that his trial counsel rendered ineffective assistance in the investigation and presentation of his defense and that but for counsel's unprofessional errors there is a reasonable probability that the result of the proceeding would certainly have

been different. While some of the alleged errors of counsel may have had an impact upon the guilt phase verdict, if established and unexplained as tactical decisions those errors would certainly appear to provide potential doubt with respect to the reliability of the jury's penalty phase verdict.[15] See Wiggins, 123 S. Ct. at 2541-44 (concluding that trial counsel's inadequate investigation into petitioner's background was unreasonable and that given the nature and extent of the abuse suffered by petitioner there was a reasonable probability that the jury would have returned a different sentence had it been confronted with mitigating evidence); Williams, 529 U.S. at 395-99 (granting habeas relief due to counsel's failure to present mitigation evidence during the penalty phase of petitioner's trial that "might well have influenced" the jury's determination); Douglas v. Woodford, 316 F.3d 1079, 1087-91 (9th Cir.) (holding that counsel's penalty phase investigation into petitioner's childhood, alcoholism, military career and exposure to toxic solvents was inadequate and that if counsel had conducted a proper investigation there was a reasonable possibility that the additional evidence would have altered the outcome of the jury's penalty phase verdict), cert. denied, ___ U.S. ___, 124 S. Ct. 49 (2003); Caro v. Woodford, 280 F.3d 1247, 1255-58 (9th Cir.) (affirming the granting of habeas relief upon finding that counsel's failure to fully investigate and present mitigating evidence regarding the effects of exposure to pesticides and toxic chemicals on petitioner's brain and the effects

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[15] The difficulty that the jury had in reaching its penalty phase verdict has been thoroughly discussed in Section A above.

of physical, emotional and psychological abuse suffered as a child was a constitutionally deficient performance by counsel and rendered the results of the penalty phase trial unreliable), cert. denied, 536 U.S. 951 (2002); Silva v. Woodford, 279 F.3d 825, 843 (9th Cir.) (discussing cases "illustrative but not exhaustive of the breadth of a criminal defendant's constitutional protection against his attorney's failure to investigate mitigating evidence when defending his client against a capital sentence"), cert. denied, 537 U.S. 942 (2002); Mayfield, 270 F.3d at 928-933 (reversing denial of habeas relief finding that counsel was deficient in failing to present mitigating evidence and finding prejudice "[e]ven in the face of [] strong aggravating evidence" since the court could not "conclude with confidence that the jury would unanimously have sentenced [petitioner] to death if [counsel] had presented and explained all of the available mitigating evidence"); Ainsworth v. Woodford, 268 F.3d 868, 873-78 (9th Cir. 2001) (inadequate investigation and failure by counsel to introduce available evidence of defendant's troubled childhood, suicidal father and drug and alcohol abuse was ineffective assistance that cast doubt on the penalty phase verdict). Here, petitioner's initial showing precludes the granting of summary judgment on these claims in favor of respondent.

On the other hand, petitioner's initial showing is not sufficient to establish his entitlement to judgment as matter of law. For instance, left unanswered are questions as to why petitioner's trial counsel chose not to conduct further investigation into the effect of their client's steroid use and its effects, why they

elected not to present all available evidence of petitioner's remorse[16] and why they elected not to fully investigate and present evidence of petitioner's social history, including sexual abuse suffered as a child.[17] Thus, petitioner has not met the burden imposed upon him under Rule 56(c) of showing that he is entitled to judgment as a matter of law on his ineffective assistance of counsel claims. See Calderone v. United States, 799 F.2d 254, 259 (6th Cir. 1986) (moving party who bears the burden of proof must make a showing in support of summary judgment "sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party").

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[16] Although counsel have declared that they never considered calling Detective Clegg as a witness and that there was no tactical reason involved, neither counsel address why they never considered presenting such evidence nor do they address in their declarations their failure to present the other available evidence of remorse identified by petitioner. (Opp'n & Cross-Mot. for Summ. J., Exs. E & F.)

[17] In this regard, it has been recognized that even "'if a client forecloses certain avenues of investigation, it arguably becomes even more incumbent upon trial counsel to seek out and find alternative sources of information and evidence, especially in the context of a capital murder trial.'" Douglas, 316 F.3d at 1086 (quoting Silva, 279 F.3d at 847).

Resolution of these claims is, therefore, likely to require an evidentiary hearing.[18] In this regard, under the applicable pre-AEDPA law "'[a] habeas petitioner is entitled to an evidentiary hearing as a matter of right on a claim where the facts are disputed if two conditions are met: (1) the petitioner's allegations would, if proved, entitle him to relief, and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts.'" Silva, 279 F.3d at 853 (quoting Jones v. Wood, 114 F.3d 1002, 1010 (9th Cir. 1997)). Under these circumstances a petitioner's motion for evidentiary hearing must be granted "'unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" Ortiz v. Stewart, 149 F.3d 923, 934 (9th Cir. 1998) (quoting 28 U.S.C. § 2255). See also Phillips v. Woodford, 267 F.3d 966, 973 (9th Cir. 2001) ("In these circumstances, a petition may be dismissed without a hearing only when it consists solely of conclusory, unsworn statements unsupported by any proof or offer thereof."). Thus, where a claim of ineffective assistance of counsel has been made it is generally likely that a hearing will be required on the issue of prejudice. Babbitt, 151

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[18] The same is true with respect to petitioner's claim that counsel provided inadequate assistance by failing to conduct meaningful voir dire and by failing to properly exercise the defense peremptory challenges. Petitioner may have difficulty in establishing that his counsel's performance in this regard was deficient, rather than a series of reasonable tactical decisions, and in proving prejudice. Nonetheless, trial counsel's thinking has not been explored and ultimately the question of whether counsel was ineffective will turn in large part on the determination of petitioner's claims of juror bias and prejudice in Claim T. See Fields, 309 F.3d at 1107-08.

F.3d at 1177; Siripongs I, 35 F.3d at 1314; see also Hoffman v. Arave, 236 F.3d 523, 536 (9th Cir. 2001) (remanding for evidentiary hearing on ineffective assistance of counsel claims because without the benefit of an evidentiary hearing "it is impossible" to evaluate the strength of the defense at trial and sentencing, as required to make the prejudice determination). Moreover, it has been recognized that an evidentiary hearing may be "extremely helpful" in reviewing aspects of a capital trial involving strategic decisions made by defense counsel. Siripongs II, 133 F.3d at 737. Because reviewing courts require a sufficient record to rule on ineffective assistance of counsel claims such as this, a full hearing is likely to be required to determine what happened, why it happened and the effect thereof. See Guy v. Cockrell, 343 F.3d 348, 354-55 (5th Cir. 2003) (reversing grant of summary judgment on ineffective assistance of counsel claims in light of existence of unresolved factual issues).

For these reasons the court will recommend that the cross-motions for summary judgment on claims C, T (to the extent it presents an ineffective assistance of counsel claim) and W be denied.[19]

D. Juror Misconduct During Penalty Phase Deliberations

In Claim D, petitioner asserts that during their penalty phase deliberations, jurors considered information that was

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[19] The court has been compelled to discuss the initial showing presented by petitioner in support of these claims in order to address the cross-motions for summary judgment. Of course, no opinion regarding the appropriate final resolution of the claims following a full hearing is intended to be expressed by this discussion.

inaccurate, irrelevant, unreliable, and prejudicial, in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (Am. Pet. at 61.) Specifically, petitioner argues that the jurors should not have considered: (1) that if petitioner was sentenced to life without the possibility of parole, he might still be released from prison and commit another crime; and (2) petitioner's demeanor during the trial, which some jurors believed showed a lack of remorse and contempt toward some witnesses. (Id. at 61-65.)

Petitioner relies upon several juror declarations submitted as exhibits to his amended petition in support this claim. In these declarations several of the jurors state that during the penalty phase deliberations jurors discussed whether life without parole really meant no possibility of parole and whether, despite what the trial judge stated in his instructions, there was a possibility that if petitioner was not sentenced to death, he might someday be released. (Am. Pet., Ex. D (Schroeder Decl.) ¶ 3; Ex. B (Visscher Decl.) ¶ 3; Ex. E (Bruley Decl.) ¶ 2; and Ex. C (McEnerney Decl.) ¶ 4.) In those same declarations jurors Schroeder, McEnerney, Bruley, and Visscher state that during penalty phase deliberations some jurors discussed that petitioner sat expressionless through much of the trial, did not appear remorseful for what he had done, did not seem to care and showed contempt for certain of the witnesses during the trial. (Schroeder Decl. ¶ 2; McEnerney Decl. ¶ 2; Bruley Decl., ¶ 3; and Visscher Decl. ¶ 2.)

In his motion for summary judgment, respondent argues that the juror declarations submitted in support of this claim by

petitioner, are inadmissible under Rule 606(b) of the Federal Rules of Evidence. (Alt. Mot. for Summ. J. at 80-84.) Respondent contends that the declarations are inadmissible because they describe discussions during the jury's deliberation, jurors' feelings and opinions, and speculation about the effect of the discussions on the verdict. (Id.)

Petitioner argues that Rule 606(b) provides that such evidence may be used to show that a juror considered extraneous information, which is the situation here. (Opp'n & Cross-Mot. for Summ. J. at 96-97.) Petitioner argues that if the declarations contain some inadmissible matter, only those portions should be deemed inadmissible. (Id. at 98-99.) Petitioner also argues that the admissibility of juror evidence should be governed by state law, rather than Rule 660(b), because of the state's interest in fair and accurate verdicts by its juries. (Id. at 103-04.)

Petitioner's position on this point is a policy argument that must be rejected. The Federal Rules of Evidence apply to federal habeas proceedings.[20] Fed. R. Evid. 1101(e); see also Bibbins v. Dalsheim, 21 F.3d 13, 16-17 (2d Cir. 1994) (applying Fed. R. Evid. 606(b) rather than state law in determining whether evidence was admissible to impeach a state court verdict); Silagy v. Peters, 905 F.2d 986, 1008-09 (7th Cir. 1990) (same); Stockton v.

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[20] "In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein . . . habeas corpus under sections 2241 - 2254 of title 28, United States Code . . . ." Fed. R. Evid. 1101(e).

Commonwealth of Virginia, 852 F.2d 740, 743-44 (4th Cir. 1988) (same); Bloom v. Vasquez, 840 F. Supp. 1362, 1377 n.23 (C.D. Cal. 1993)(holding that pursuant to Federal Rule of Evidence 1101(e), the Federal Rules of Evidence apply to federal habeas cases), rev'd on other grounds by Bloom v. Calderon, 132 F.3d 1267 (9th Cir. 1997).

Rule 606(b) of the Federal Rules of Evidence provides:

> **Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Fed. R. Evid. 606(b).

The admissibility of a juror's testimony is a threshold question the court must address before reaching the merits of petitioner's jury misconduct claim. See United States v. Maree, 934 F.2d 196, 201 (9th Cir. 1991). As discussed in Sassounian v. Roe, 230 F.3d 1097 (9th Cir. 2000), juror testimony may be considered to demonstrate that extraneous evidence or information was introduced during the jury's deliberation, but not to show the subjective impact of that extraneous information:

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> A long line of precedent distinguishes between juror testimony about the consideration of extrinsic evidence, which may be considered by a reviewing court, and juror testimony about the subjective effect of evidence on the particular juror, which may not. . . . Therefore, although we may consider testimony concerning whether the improper evidence was considered, we may not consider the jurors' testimony about the subjective impact of the improperly admitted evidence.

Id. at 1108-09. See also Tanner v. United States, 483 U.S. 107, 127 (1987) ("[L]ong-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry.").

Generally, information acquired from a third party or from outside reference during deliberation is considered extrinsic and evidence that the jury received such information is admissible under Rule 606(b) to impeach the verdict. See United States v. Navarro-Garcia, 926 F.2d 818, 821 (9th Cir. 1991) ("Evidence not presented at trial, acquired through out-of-court experiments or otherwise, is deemed 'extrinsic.'"); Marino v. Vasquez, 812 F.2d 499, 505-06 (9th Cir. 1987) (finding admissible as an "outside influence" information that a juror consulted a dictionary to define the word "malice"); Gibson v. Clanon, 633 F.2d 851, 855 (9th Cir. 1980).

Jurors may rely on their personal experiences in deliberating and in doing so are not exposed to extrinsic evidence. See Price v. Kramer, 200 F.3d 1237, 1255 (9th Cir.), cert. denied, 531 U.S. 816 (2000) (finding that there was no improper extraneous evidence when, during deliberation, two jurors shared past personal experiences which were of a general nature); Navarro-Garcia, 926 F.2d at 821; Casey v. United States, 20 F.2d 752, 754 (9th Cir. 1927).

The shared personal experiences of jurors become extraneous information if the "juror has personal knowledge regarding the parties or the issues involved in the litigation that might affect the verdict." Navarro-Garcia, 926 F.2d at 821. Such information may also be deemed extraneous "if the jury considers a juror's past personal experiences in the absence of any record evidence on a given fact, as personal experiences are relevant only for purposes of interpreting the record evidence." Id. at 822.

Here, the jurors' discussions regarding the meaning and consequences of a life sentence without the possibility of parole did not involve extraneous information. None of the declarations submitted by petitioner indicate that the jurors received information regarding the meaning of a sentence of life without the possibility of parole from a non-juror. Moreover, identical claims have been found to involve only intrinsic jury processes which are not subject to collateral attack. Belmontes, 350 F.3d at 891; Bloom, 840 F. Supp. at 1377-78; see also Fullwood v. Lee, 290 F.3d 663, 684 (4th Cir. 2002), cert. denied, 537 U.S. 1120 (2003) (holding that the jury's discussion about the defendant's eligibility for parole "does not qualify as an extraneous matter since virtually every juror will have preconceived notions about the legal process which the defendant can uncover and examine during jury selection"); Silagy, 905 F.2d at 1008-09.

As to petitioner's other sub-claim involving the jury's consideration of his demeanor, respondent argues that there is no United States Supreme Court precedent supporting this claim and that

the defendant's demeanor is one of several factors the jury may consider in determining the appropriate penalty.[21] (Alt. Mot. for Summ. J. at 88-89.) In his opposition and cross-motion, petitioner acknowledges that the Ninth Circuit has indicated that a capital sentencing authority may consider a defendant's in-court demeanor. See Williams v. Calderon, 52 F.3d 1465, 1483 (9th Cir. 1995). However, petitioner argues that the court's observation to this effect in Williams is dictum. Nonetheless, in light of the decision in Williams petitioner concedes that further argument to this court on the point would be futile. (Opp'n & Cross-Mot. for Summ. J. at 120.)

The concession is appropriate. A defendant's courtroom demeanor is evidence that a jury may properly consider. Williams, 52 F.3d at 1483; United States v. Schuler, 813 F.2d 978, 981 n.3 (9th Cir. 1987); see also Bates v. Lee, 308 F.3d 411, 421 (4th Cir. 2002) (defendant's demeanor at trial was before the jury at all times and it was not improper for the prosecutor to comment on it in closing argument), cert. denied, ___ U.S. ___, 123 S. Ct. 2223 (2003).

Accordingly, because with respect to the matters raised in this claim the jury did not improperly consider extraneous evidence or information in their penalty phase deliberations, respondent's motion for summary judgment on this claim should be granted and petitioner's cross-motion should be denied.

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[21] Respondent appears to raise an exhaustion argument with respect to this sub-claim in a footnote. (See Alt. Mot. for Summ. J. at 88 n.43.) Because respondent has not fully briefed this argument, the court will not address it.

E. Jury Instruction Re Mitigation Evidence

In this claim petitioner alleges that the trial court erroneously rejected his request that two specific jury instructions be given with respect to the consideration of evidence mitigating against a death sentence. (Am Pet. at 65.) Specifically, petitioner alleges that the following two requested instructions should have been given:

> An individual juror may consider something as a mitigating factor if any reasonable evidence supports the existence of this mitigating factor and regardless of whether all twelve jurors find the existence of reasonable evidence of this mitigating factor.
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> * * *
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> Each mitigating factor is important because any single mitigating factor may, standing alone, support a decision that death is not the appropriate penalty.

(Id. (citing CT at 1498, 1501.) Petitioner claims that in rejecting the proposed instructions the trial court acted in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Respondent moves for summary judgment in his favor on this jury instruction claim. Respondent argues that because the jury instructions given in petitioner's case did nothing to limit the consideration of mitigating evidence, petitioner has failed to allege a cognizable claim of federal constitutional error. According to respondent, the instructions given were adequate to perform the constitutional function of guiding the jury's direction in sentencing and were in compliance with United States Supreme Court precedent.

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(Alt. Mot. for Summ. J. at 90-94 (citing Buchanan v. Angelone, 522 U.S. 269 (1998); Boyde v. California, 494 U.S. 370 (1990)).)

Petitioner opposes respondent's motion and moves for summary judgment in his own favor on this claim. In so moving, petitioner argues that there is a reasonable likelihood that the jurors understood the instructions as given to preclude consideration of relevant mitigating evidence. In this regard, petitioner argues that because the first requested instruction set out above was rejected and the instructions as given repeatedly referred to "mitigating factors" in the plural, it is reasonably likely that the jury understood the instructions as precluding the use of a single mitigating factor to support a sentence of life without the possibility of parole. In addition, petitioner argues that because the second requested instruction was rejected and the instructions as given referred to the jury with the collective "you," it is reasonably likely that the jury understood the instructions as precluding an individual juror from considering an item as mitigating unless the jurors were unanimous on the point. Finally, petitioner contends that the Supreme Court's decisions in Buchanan and Boyde did not involve proposed instructions similar to those presented by the defense in his case and that, in any event, the legal principles announced in those decisions support the granting of habeas relief here.

In general, a challenge to jury instructions does not state a federal constitutional claim. See Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119

(1982)); Gutierrez v. Griggs, 695 F.2d 1195, 1197 (9th Cir. 1983). In order to warrant federal habeas relief, a challenged jury instruction "cannot be merely 'undesirable, erroneous, or even "universally condemned,"' but must violate some due process right guaranteed by the fourteenth amendment." Prantil v. California, 843 F.2d 314, 317 (9th Cir. 1988) (quoting Cupp v. Naughten, 414 U.S. 141, 146 (1973)). To prevail on such a claim petitioner must demonstrate "that an erroneous instruction 'so infected the entire trial that the resulting conviction violates due process.'" Prantil, 843 F.2d at 317 (quoting Darnell v. Swinney, 823 F.2d 299, 301 (9th Cir. 1987)). In making its determination, this court must evaluate the challenged jury instructions "'in the context of the overall charge to the jury as a component of the entire trial process.'" Id. (quoting Bashor v. Risley, 730 F.2d 1228, 1239 (9th Cir. 1984)). Where the challenge is to a refusal or failure to give an instruction, the petitioner's burden is "especially heavy," because "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Henderson v. Kibbe, 431 U.S. 145, 155 (1977). See also Villafuerte v. Stewart, 111 F.3d 616, 624 (9th Cir. 1997).

The Eighth Amendment requires adherence to two basic steps in the capital decisionmaking process: an "eligibility" decision and a "selection" decision. Petitioner's claim involves the latter. In this regard, the Constitution requires that the jury in a capital case "be able to 'consider and give effect to [a defendant's mitigating] evidence in imposing sentence.'" Penry v. Johnson (Penry

(II), 532 U.S. 782, 797 (2001) (quoting Penry v. Lynaugh (Penry I), 492 U.S. 302, 319 (1989)). Thus, the jury is to consider "*as a mitigating factor*, any aspect of [the] defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original). See also Penry II, 532 U.S. at 797; Belmontes, 350 F.3d at 898. The Supreme Court has explained the constitutional underpinnings of this requirement as follows:

> For it is only when the jury is given a "vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision," Penry I, 492 U.S. at 328, that we can be sure that the jury "has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence," id., at 319 (quoting Woodson v. North Carolina, 428 U.S. 280, 304, 305 (1976)).

Penry II, 532 U.S. at 797 (parallel citations omitted). See also Blystone v. Pennsylvania, 494, U.S. 299, 307-08 (1990).

Accordingly, a trial judge's instructions are to communicate to the jury "that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." Buchanan v. Angelone, 522 U.S. 269, 276 (1998) (citing Penry I, 492 U.S. at 317-18; Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982); Lockett, 438 U.S. at 604); Belmontes, 350 F.3d at 898. In this same vein, the Supreme Court has struck down state procedures that limited any given juror's consideration of mitigating circumstances in capital sentencing to such evidence that

the entire jury had found relevant. McKoy v. North Carolina, 494 U.S. 433, 463 (1990) ("Such a scheme, under which . . . a single juror's finding regarding the existence of mitigation must control, is asserted to be demanded by 'the principle established in [Lockett], that a sentencer may not be precluded from giving effect to all mitigating evidence.'"); Mills v. Maryland, 486 U.S. 367 (1988).

Finally, the standard to be applied in reviewing a claim that penalty phase jury instructions ran afoul of these constitutional requirements is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" Buchanan, 522 U.S. at 276 (quoting Boyde, 494 U.S. at 380). See also Belmontes, 350 F.3d at 900. In the face of such a challenge, the jury's penalty decision "must stand 'if there is *only a possibility* of such an inhibition'" Belmontes, 350 F.3d at 905 (quoting Boyde, 494 U.S. at 380).[22]

At the conclusion of the penalty phase of petitioner's trial the jury was given a number of instructions to guide them in their deliberations with respect to the consideration of mitigating factors and the appropriate penalty. In this regard, the jury was instructed that:

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[22] The Constitution does not require that a specific instruction on mitigating evidence be given as long as the instructions given do not preclude the capital jury from considering mitigating evidence. Buchanan, 522 U.S. at 276-77; see also Weeks v. Angelone, 528 U.S. 225, 232 (2000).

(1) "the law does not dictate which of the two choices you must choose [death or life without the possibility of parole]; that choice is solely up to you" (CT at 1525; RT at 7391);

(2) they shall consider as "a mitigating factor" any mental or emotional impairments suffered by the defendant as a result of alcohol and drug abuse or from psychological and sexual abuse or from his family background (CT at 1527; RT at 7392);

(3) "any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial may be considered as a mitigating factor" (CT at 1527; RT at 7392-93);

(4) "You may consider pity, sympathy or mercy for David Anthony Breaux" (CT at 1528; RT at 7393);

(5) "Even if you conclude that the aggravating factors outweigh the mitigating factors, you are not required to impose death but may in your discretion return a verdict of life without possibility of parole" (CT at 1528; RT at 7393);

(6) they could consider any lingering doubt of Mr. Breaux's guilt or the truth of the special circumstance as a mitigating factor (CT 1529; RT 7393-94);

(7) if they concluded the aggravating factors outweighed the mitigating factors they "may" impose a sentence of death but if they determined the mitigating factors outweighed the aggravating factors they "shall" impose the sentence of life without possibility of parole (CT at 1530; RT at 7395);

(8) if they were not convinced beyond a reasonable doubt that aggravating factors outweighed the mitigating factors they must choose life imprisonment without the possibility of parole and if they had a reasonable doubt as to the appropriate punishment they likewise were required to choose life without the possibility of parole (CT at 1531; RT at 7395);

> (9) their consideration of aggravating factors was limited to those listed by the court but a "mitigating factor" was any "consideration which does not necessarily constitute a justification or excuse of the offense in question, but which you may view as extenuating or reducing the degree of Mr. Breaux's culpability" (CT at 1533-34; RT at 7396-97);
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> (10) the weighing of mitigating and aggravating factors is not a mechanical counting of factors but rather the jurors were "free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider" (CT at 1537; RT at 7398);
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> (11) the parties were "entitled to the individual opinion of each juror," "[e]ach of you must decide the case for yourself" and "should not be influenced to decide any question in a particular way because a majority of the jurors, or any one of them, favor such a decision" (CT at 1540; RT at 7400) and
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> (12) their verdict must be unanimous (CT at 1544-45; RT at 7403).

The jury was provided with three verdict forms from which to choose. The first reflected a finding that aggravating factors did not outweigh mitigating factors, resulting in a punishment of life imprisonment without the possibility of parole. The second reflected a finding that aggravating factors outweighed mitigating factors but nonetheless choosing a punishment of life imprisonment without the possibility of parole. The third reflected a finding that aggravating factors outweighed mitigating factors and choosing the punishment of death. (CT at 1545; RT at 7404.)

The two proposed penalty phase jury instructions upon which petitioner bases this claim were objected to by the prosecution and rejected by the trial court because they were found to be confusing

and to address matters adequately covered in the instructions as given. (RT at 7204-05, 7214-15.) The court concludes that no constitutional error was committed in the rejection of the two proposed defense instructions.

Considering the penalty phase instructions as a whole, there is not a reasonable likelihood that petitioner's jury applied those instructions in a manner that prevented consideration of any mitigating factor. See Buchanan, 522 U.S. at 276; Boyde, 494 U.S. at 380); Belmontes, 350 F.3d at 904-05. In this regard, the court finds unpersuasive petitioner's argument that his first requested instruction was necessary because the instructions as given repeatedly referred to "mitigating factors" in the plural making it reasonably likely that the jury understood they were precluded from using a single mitigating factor to support a sentence of life without the possibility of parole. First, the argument is factually inaccurate in that the instructions given in many instances referred to "mitigating factor" in the singular. (See CT at 1527, 1529, 1533-34; RT at 7392-94, 7396-97.) Moreover, when the instructions are considered as a whole[23] it is clear that the jury was adequately

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[23] In particular, as set forth above, petitioner's jury was instructed that if they had a reasonable doubt as to the appropriate punishment, they were required to choose life without the possibility of parole. (CT at 1531; RT at 7395.) They were also instructed that they could consider as a mitigating factor any sympathetic or other aspect of the defendant's character or record whether or not related to the offense. (CT at 1527; RT at 7392-93.) Finally, they were instructed that a mitigating factor was any consideration which, while not constituting a justification of the offense, the jury viewed as reducing the degree of petitioner's culpability (CT at 1533-34; RT at 7396-97).

informed that they were free to consider any relevant mitigating factor. See Jeffries v. Blodgett, 771 F. Supp. 1520, 1548 (W.D. Wash. 1991) (rejecting the same argument advanced by petitioner here), vacated and remanded on other grounds, 5 F.3d 1180 (9th Cir. 1993).

No more compelling is petitioner's argument that his second requested instruction was required because the instructions as given referred to the jury with the collective "you," making it reasonably likely that the jury understood the instructions as precluding an individual juror from considering an item as mitigation unless the jurors were unanimous on the point. Nothing in the instructions or the verdict forms required the jurors to reach agreement as to the existence of any particular mitigating factor. The only unanimous agreement required was for the return of a penalty verdict. (CT at 1544-46.) Any suggestion that reference to the jury as "you" in the instructions suggested to the jurors that they could not consider a mitigating factor unless all agreed as to its existence is clearly overcome by the instruction given advising each juror of the duty to provide the parties with his or her individual opinion, uninfluenced "to decide any question in a particular way because the majority of the jurors, or any one of them, favor such a decision." (CT at 1540; RT at 7400.) No more specific instruction was required. See Buchanan, 522 U.S. at 276-77; see also Weeks v. Angelone, 528 U.S. 225, 232 (2000). Thus, there is not a reasonable likelihood that petitioner's jury applied the instructions in a manner that prevented consideration of any mitigating factor.

Accordingly, respondent's motion for summary judgment should be granted with respect to this claim and petitioner's cross-motion for summary judgment should be denied.

F. Trial Court's Denial of Pitchess Discovery

In this claim petitioner alleges that the trial court erred in denying him discovery with respect to mitigating evidence in violation of his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (Am. Pet. at 66-68.) Specifically, petitioner alleges that the prosecution relied on his 1975 felony conviction for battery on a police officer as an aggravating factor in support of a death sentence. Petitioner alleges that he sought discovery of citizen complaints against the two officers who were the victims of the 1975 assault. Following an in camera review of the citizen complaints produced for inspection, the trial court denied petitioner's discovery motion. Petitioner alleges that the trial court's actions prevented him from countering the prosecution's penalty phase case and denied him his right to a fair penalty phase trial.

Respondent moves for summary judgment on this claim, arguing that: (1) petitioner has failed to state a cognizable claim; (2) the trial court's denial of discovery was not an abuse of discretion since the court reviewed pre-1975 complaints against the officers and considered file cards listing post-1975 complaints before denying discovery and petitioner's showing of materiality with respect to the discovery sought was weak; (3) the defense made a tactical decision to avoid relitigating the 1975 prior offense,

making discovery unnecessary; and (4) the 1975 prior conviction was of little importance to the penalty phase presentation in any event.

Petitioner opposes respondent's motion for summary judgment and moves for partial summary judgment in his own favor on the issue of whether the trial court erred in denying his discovery motion. Petitioner asserts that the issue of prejudice is not ripe for determination because it is unknown what information would have been discovered had the discovery motion properly been granted.

On April 23, 1985, counsel on behalf of petitioner filed a motion seeking disclosure of police personnel records reflecting complaints and investigations of the police officers involved in the incident that resulted in petitioner's 1975 felony conviction for battery on a police officer. (CT at 712-27.)[24] Petitioner's trial counsel took the position that the defense was not required to allege the existence of prior complaints against the officers in order to be entitled to such discovery under state law. (CT at 720.) The City Attorney opposed the motion on behalf of the Sacramento Police Department. (CT at 797-99.) The motion came on for hearing on July 31, 1985. (RT Pretrial (PT) at 50-80.) At that time the court granted the motion only with respect to personnel records reflecting complaints within five years prior to petitioner's 1975 conviction.

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[24] The so-called Pitchess (Pitchess v. Superior Court, 11 Cal. 3d 531 (1974)) motion was re-filed on July 2, 1985. (CT at 785-94.)

(RT PT at 75-79.)[25] The court set a date for the custodian of records to appear with the ordered discovery. (Id. at 82; CT at 825.) On October 23, 1985, a hearing was held at which time the designated representative of the Sacramento Police Department appeared and testified regarding his records search. (RT PT at 122-67.) The court clarified that the discovery order required review of any personnel records reflecting complaints against the officers for the five year period prior to the incident as well as for the time period between the incident and petitioner's conviction for assaulting a police officer. (Id. at 162-66.) The court reiterated its ruling that no search for complaints made against the officers after petitioner's 1975 conviction was required. (Id. at 166.) On November 14, 1985, the court announced that it had reviewed index cards reflecting any formal and informal complaints for the officers in question as well as all files still in existence containing complaints against the officers for the relevant time period. (Id. at 212.) The court found that none of the information reviewed was

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[25] California Evidence Code § 1045(b)(1) directs a court to exclude from disclosure information "consisting of complaints concerning conduct occurring more than five years before the event or transaction which is the subject of the litigation in aid of which discovery or disclosure is sought."

relevant to petitioner's capital murder trial and disclosure was therefore denied. (Id. at 215-16.)[26]

As noted above, before the trial court petitioner's counsel took the position that they were not required to allege the existence of prior complaints against the officers in order to be entitled to the sought-after discovery under state law. Accordingly, counsel never attempted to make a showing that the officers' files in fact contained complaints, either relating to the period before or after 1975, material to petitioner's defense. That failure is fatal to this claim of constitutional error.

In Harrison v. Lockyer, 316 F.3d 1063 (9th Cir.), cert. denied, ___ U.S. ___, 123 S. Ct. 1805 (2003), the court was confronted with a somewhat similar claim. In that case the petitioner had moved the state trial court for discovery of all police records from the arresting officer's personnel file, including records of complaints more than five years before the incident at issue. 316 F.3d at 1065. The motion was denied, the order was affirmed and review was denied. Id. In a federal habeas action petitioner alleged that California's five year cut-off for the discovery of impeachment material violated his due process rights.

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[26] The index cards were reviewed because by 1985, police personnel files involving the time period pre-1975 had been destroyed in the regular course of business. The parties spend much time arguing over whether the trial court reviewed all the entries on the index cards or only those for the 1970-75 time period. The record is not clear in this regard. Nonetheless, given the court's analysis of this issue, whether the trial court reviewed all the index card entries or only some of them, is of no consequence.

Id. The Ninth Circuit found that this constitutional claim was properly rejected, stating as follows:

> We postponed decision of this case until the Supreme Court of California had decided an analogous challenge to the five-year cut-off pertaining to evidence from the police files. That court has held that despite the statutory cut-off, citizen complaints against officers are subject to disclosure if they are "exculpatory" and that a California trial court should order such disclosure after the court has reviewed the file in chambers. City of Los Angeles v. Superior Court, 29 Cal.4th 1, 124 Cal.Rptr.2d 202, 52 P.3d 129, 137 (Cal. 2002). This judicial review, however, is contingent on the defendant making a preliminary showing that the file contains information material to his defense. Id. at 138. The California Supreme Court observed that this procedure complied with Brady v. Maryland, 373 U.S. 83, 87-88, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), as modified by Pennsylvania v. Ritchie, 480 U.S. 39, 58, n. 15, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) (defendant must establish "a basis for his claim that the file contains material evidence"). City of Los Angeles v. Superior Court, 124 Cal.Rptr.2d 202, 52 P.3d at 138-39.
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> We are not instructed on how a defendant in a criminal case will know, or be able to make, a preliminary showing that a police personnel file contains evidence material to his defense. But we are clear that the California Supreme Court has faithfully followed the United States Supreme Court. In our case Harrison made no showing that [the officer's] file contained complaints material to his defense. Therefore, Harrison was not denied due process when he was denied access to material more than five years old.

Id. at 1065-66.

Thus, despite any statutory cut-off imposed by California law, citizen complaints against officers are to be disclosed if they are exculpatory. However, the defendant must first make a preliminary showing that the personnel file in fact contains

information material to the defense. This conclusion is consistent with the standards applicable to any claim of the withholding of evidence favorable to the accused with respect to guilt or punishment. See Brady v. Maryland, 373 U.S. 83 (1963). In order to establish a Brady violation, a petitioner must prove three things: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

Here, as in Harrison, the petitioner failed to make any showing that evidence within the police personnel files was exculpatory. Accordingly, petitioner's constitutional rights were not violated when he was denied access to those materials. Therefore, petitioner's motion for partial summary judgment on this claim should be denied and respondent's motion for summary judgment granted.

G. Trial Court's Failure To Recuse the District Attorney's Office and the Assigned Deputy District Attorney

In this claim petitioner asserts that his constitutional rights were violated when the state trial court denied his motion to recuse the Sacramento County District Attorney's Office and the deputy district attorney who tried his case. (Am. Pet. at 68-72.) Specifically, petitioner alleges the following. The murder victim, Connie Decker, was the most active volunteer in a local social and charitable club. The members of that club took extraordinary

interest in the prosecution of the case and in urging the imposition of the death penalty. The deputy district attorney assigned to try petitioner's case suggested that the club designate a member as its representative to the District Attorney's Office. That representative, an attorney, subsequently had between 23 and 35 contacts with prosecutors about the case. The contacts were extensive enough that the trial attorney testified that had he been about to resolve the case short of trial he would have called the club representative.

In addition, petitioner alleges that the murder victim had been romantically involved with a Sacramento County Municipal Court Commissioner who was a former deputy district attorney. The Commissioner characterized the prosecutors involved in petitioner's case as being good friends of his. When the Commissioner learned that petitioner had offered to plead guilty in exchange for a sentence of life without parole, he passed the information on to his brother, who was a member of the social club noted above. Finally, petitioner alleges that the wife of the trial prosecutor was also a member of that social club. The prosecutor himself knew several members of the club, attended some of their events, at his wife's request spoke at a club function to discuss the criminal justice system, volunteered to take over the case when the previously-assigned prosecutor developed a calendaring conflict and then had ten contacts with the attorney designated as the club's representative, who was also an acquaintance of the prosecutor.

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Petitioner alleges that although the Sacramento County District Attorney's Office had no written standards for determining whether to seek or continue pursuing the death penalty and despite the fact that in other cases where the death penalty was initially sought that office allowed defendants to plead guilty in exchange for a sentence of life without parole, in petitioner's case the prosecutor refused to entertain such a resolution. Petitioner contends that a full investigation and evidentiary hearing with respect to this claim is necessary. In the end, he alleges that the denial of his recusal motion violated his constitutional rights as guaranteed by the Fifth, Eighth and Fourteenth Amendments.

Respondent moves for summary judgment on this claim. Respondent argues that the state trial court conducted a full evidentiary hearing on the recusal motion and that the state court's determination of factual issues is entitled to a presumption of correctness on habeas review. In this regard, respondent notes the state court findings, affirmed on appeal, that petitioner had failed to show bias, conflict of interest, an appearance of a conflict or a likelihood that a fair trial could not be provided. Because petitioner was not denied a fair trial by the involvement of the Sacramento County District Attorney's Office in trying the case, respondent contends he is entitled to summary judgment in his favor on this claim.

Petitioner opposes respondent's motion and seeks judgment in his favor as a matter of law on this claim. Petitioner argues that the interest in the case expressed by the Municipal Court

Commissioner, the involvement and concern expressed by members of the social club in which the victim had been an active member and the prosecutor's connection with that social club through his wife, including his appearance at a club luncheon to discuss the capital case process before he took over the prosecution of the case, combined to form a web of personal and professional conflicts resulting in unfairness in the prosecution of this case. Petitioner agrees that the fairness of the trial is the issue presented but contends that such fairness includes a fair-minded exercise of prosecutorial discretion with respect to charging decisions and plea bargaining. (Opp'n & Cross-Mot. for Summ. J. at 166 (citing Ganger v. Peyton, 379 F.2d 709, 712 (4th Cir. 1967).) Petitioner again argues that although this District Attorney's Office had resolved other capital cases with sentences of life without parole, it refused to dispose of petitioner's case in that manner.[27]

Before petitioner's trial commenced, an evidentiary hearing was held with respect to petitioner's recusal motion. (RT at 5-133.) In addition to the facts summarized above, the court heard testimony that Mr. John O'Mara, Supervisor of the Major Crimes Section, made the initial recommendation in the charging and disposition of capital cases and that the ultimate decision regarding whether to seek the death penalty is made by the District Attorney of Sacramento County.

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[27] In support of this point, petitioner cites three cases and submits the declarations of counsel in two of those cases which merely state that they were capital cases resolved by plea agreements calling for the imposition of the sentence of life without parole. (Opp'n & Cross-Mot. for Summ. J. at 168 n.121 & Ex. NN.)

(RT at 60, 70-72.) Deputy District Attorney O'Mara testified that prior to re-assigning the case he told the social club representative that in his judgment the case should proceed to trial and that a jury should determine the appropriate penalty. (RT at 79.) Deputy District Attorney Druliner, the trial prosecutor, testified that he did not feel that the contacts from the social club representative were attempts to influence his handling of the case. (RT at 61.) He also had the impression that the social club was interested in seeing the case handled in a professional manner as opposed to being committed to the prosecution of the case to a death verdict, while recognizing that there were some members who no doubt wanted the latter course followed. (RT at 64-68.) Mr. O'Mara also testified that he had told Mr. Druliner that he didn't think it was a good idea for him to address the social club but that he could not prevent him from doing so. (RT at 86-87.) The trial court denied the motion to recuse, finding that no conflict of interest had been established and that there was no evidence that any pressure had been put on the District Attorney's Office or that the prosecutor had been improperly influenced in his handling of the case. (RT at 131-33.)

Prosecutors are "traditionally accorded wide discretion . . . in the enforcement process." Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980). Nonetheless,

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> [a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.

Id. at 249-50. Similarly, it has long been recognized that

> [a criminal prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). Accord Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 807 (1987), These same principles apply with equal force to state prosecutors. Sheppard v. Rees, 909 F.2d 1234, 1238 (9th Cir. 1989).

Nonetheless, the standards of neutrality for prosecutors are not as demanding as those applied to judicial or quasi-judicial officers. Young, 481 U.S. at 810; Marshall, 446 U.S. at 249-50; Dick v. Scroggy, 882 F.2d 192, 197 (6th Cir. 1989). This is because, unlike judges who must always remain impartial, prosecutors are partisan advocates who are permitted to be zealous in their enforcement of the law. Marshall, 446 U.S. at 248-50; Dick, 882 F.2d at 197. Accordingly, a petitioner claiming that a prosecutor bore a personal bias against him must demonstrate that the fairness of his

trial was affected and that he was thus prejudiced by the prosecutor's involvement. Dick, 882 F.2d at 196-97 ("[W]e are not persuaded that Mr. Dick's prosecution by a Commonwealth Attorney who may have been less than disinterested constituted an irregularity 'sufficiently fundamental' to justify our setting aside the conviction in this case."); Newman v. Frey, 873 F.2d 1092, 1093-94 (8th Cir. 1989) (habeas relief denied where one of the prosecutors in petitioner's murder case was a friend of the murder victim and had represented the victim's family and business in civil legal matters); Gallo v. Kernan, 933 F. Supp. 878, 885 (N.D. Cal. 1996)(habeas relief denied where it was claimed that the prosecutor demonstrated an improper personal and emotional bias against petitioner by taking unprecedented actions, including visiting the victim in the hospital, attending the victim's divorce proceedings and taking positions adverse to petitioner, that the prosecutor had not taken in similar cases), aff'd, 141 F.3d 1175 (9th Cir. 1998); see also United States v. Terry, 17 F.3d 575, 579 (2d Cir. 1994).

Instructive in this regard is the decision in Wright v. United States, 732 F.2d 1048 (2d Cir. 1984). In that case the petitioner challenged his federal Hobbs Act conviction on the grounds that he had been deprived of his constitutional right to a disinterested prosecutor. It was established that the wife of the trial prosecutor had brought two prior complaints regarding petitioner to federal authorities, had actively petitioned federal, state and local authorities to investigate petitioner, and had allegedly been assaulted by petitioner's supporters. 732 F.2d at

1055. Nonetheless, the court affirmed the dismissal of the petition for post-conviction relief concluding:

> In short, this case, with the facts taken at their worst against the Government, does not present the spectacle of a prosecutor's using the "awful instruments of the criminal law" [citation omitted] for purpose of private gain and, although we consider the choice of Puccio as prosecutor to have been ill advised, we do not regard it as having deprived Wright of due process of law. At the very most . . . it deprived him of the chance that, with another prosecutor, he might have undeservedly escaped indictment and consequent conviction for crimes of which he was properly found to be guilty.

732 F.2d at 1058.

This case is no different. In support of his claim petitioner focuses in large part on the prosecutor's refusal to resolve his case by way of guilty plea in exchange for an agreed upon sentence of life imprisonment without parole. He cites three capital cases that the Sacramento County District Attorney's Office agreed to resolve in this manner. However, whether to offer a plea bargain clearly is an area in which prosecutors are accorded relatively unfettered discretion. Weatherford v. Bursey, 429 U.S. 545, 561 (1977) ("[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial."); King v. Brown, 8 F.3d 1403, 1408 (9th Cir. 1993).[28]

Petitioner's reliance on the decision in Ganger v. Peyton is likewise unavailing. In that case the petitioner had been

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[28] "The Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." Mabry v. Johnson, 467 U.S. 504, 511 (1984).

convicted of assaulting his wife. The prosecutor, who was employed in that capacity part-time, represented the wife in the pending divorce action based on the same assault. The court found that the prosecutor had offered to dismiss the assault charge in exchange for a property settlement favorable to his client in the divorce action. 379 F.2d at 711-12. Under those extreme circumstances the court found that the obvious conflict of interest required the setting aside of the state court conviction. Id. at 714-15. In petitioner's case, then-Deputy District Attorney Druliner did not initiate the prosecution, as the prosecutor in Ganger did. Rather, he took over the prosecution from John O'Mara, the supervisor of the Major Crimes Section of the office, who had developed a scheduling conflict. The decision to seek the death penalty had already been made before Druliner came into the case. Moreover, unlike the prosecutor in Ganger, there is no claim here that the prosecutor who tried petitioner's case was utilizing the criminal process to advance his own pecuniary interest. See Dick, 882 F.2d at 193-97 (habeas relief denied in an assault case arising out of an auto accident where the prosecutor subsequently represented the accident victim in a civil case against the petitioner even though that representation may have commenced prior to the challenged conviction); Newman, 873 F.2d at 1093-94; Wright, 732 F.2d at 1057-58 (distinguishing Ganger); Gallo, 933 F. Supp. at 885.

For these reasons the court concludes that petitioner has failed to make a showing that the Sacramento District Attorney's Office, and the deputy district attorney who tried his case in

particular, harbored such extreme personal bias or prejudice against him that his due process rights were violated. Accordingly, petitioner's motion for summary judgment on this claim should be denied and respondent's motion for judgment in his favor should be granted.

H. Systematic Underrepresentation of Hispanics in the Jury Panel

Petitioner claims that the systematic and substantial underrepresentation of persons of Hispanic origin from the panel from which his jury was selected violated his constitutional right to a jury drawn from a fair cross-section of the community. (Am. Pet. at 73-78.) Specifically, petitioner claims that the trial erred in denying his motion to quash the jury venire in that he had made the prima facie showing required under Duren v. Missouri, 439 U.S. 357 (1979). Accordingly, petitioner claims, the prosecution should have been required to demonstrate a significant state interest advanced by the jury selection process that resulted in the disproportionate exclusion of Hispanics.

Respondent moves for summary judgment on this claim, noting that the state trial court held an evidentiary hearing on the defense motion to quash the jury venire and, after taking evidence, concluded that the defense had failed to make even a prima facie showing of unconstitutional underrepresentation. (RT at 1611-13.) That determination was affirmed on appeal by the California Supreme Court. See Breaux, 1 Cal. 4th at 297-99. Respondent argues that even viewed in the light most favorable to petitioner, the evidence presented by

the defense established an absolute disparity between eligible Hispanic jurors in the population and those appearing in the jury pool of 2.8%, a disparity repeatedly found insubstantial and constitutionally permissible.

Petitioner opposes the respondent's motion and moves for summary judgment in his favor on this claim. He argues that it is undisputed that the group alleged to be excluded (Hispanics) is a "distinctive" group in the community. See Duren, 439 U.S. at 364. He asserts the only questions are whether the representation of Hispanics in the jury venire was fair and reasonable in relation to the number of Hispanics in the community and, if not, whether that underrepresentation was due to the systematic exclusion of Hispanics in the jury-selection process. Id. Most importantly for resolution of the pending motion, petitioner concedes that in light of binding Ninth Circuit precedent he failed to make out a prima facie case of substantial underrepresentation of Hispanics as required.

In Taylor v. Louisiana, 419 U.S. 522 (1975), the United States Supreme Court held that systematic exclusion of women during the jury-selection process, resulting in jury pools not "reasonably representative" of the community, denies a criminal defendant his Sixth and Fourteenth Amendment right to a jury selected from a fair cross-section of the community. 419 U.S. at 531-33. See also United States v. Esquivel, 88 F.3d 722, 724-25 (9th Cir. 1996). In order to establish a prima facie violation of the fair-cross-section requirement, a defendant must show:

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> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren, 439 U.S. at 364. See also Thomas v. Borg, 159 F.3d 1147, 1149-50 (9th Cir. 1998); Esquivel, 88 F.3d at 725.

It is conceded that petitioner satisfied the first prong of the prima facie showing requirement in that Hispanics are members of a distinctive and identifiable group in the community. See United States v. Nelson, 137 F.3d 1094, 1101 (9th Cir. 1998); United States v. Sanchez-Lopez, 879 F.2d 541, 547 (9th Cir. 1989).[29] As to the second prong, however, "'the Duren test requires proof, typically statistical data, that the jury pool does not adequately represent the distinctive group in relation to the number of such persons in the community.'" Thomas, 159 F.3d at 1150 (quoting Esquivel, 88 F.3d at 726). See also Belmontes, 350 F.3d at 890.

Here, petitioner argues that in determining the extent of underrepresentation of Hispanics in the jury venires the comparative disparity test should be employed. As petitioner recognizes, however, that position has been rejected by the Ninth Circuit, which instead has long applied the absolute disparity analysis. Thomas, 159 F.3d at 1150; Esquivel, 88 F.3d at 726; United States v.

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[29] "[T]he Supreme Court has held that 'there is no rule that [Sixth Amendment claims] may be made only by those defendants who are members of the group excluded from jury service.'" United States v. Nelson, 137 F.3d at 1101 n.1 (quoting Taylor, 419 U.S. at 526).

Cannady, 54 F.3d 544, 548 (9th Cir. 1995); Sanchez-Lopez, 879 F.2d at 547; United States v. Kleifgen, 557 F.2d 1293, 1297 (9th Cir. 1977). The absolute disparity is determined by "'taking the percentage of the group at issue in the total population and subtracting from it the percentage of that group that is represented on the master jury wheel.'" Thomas, 159 F.3d at 1150 (quoting Sanchez-Lopez, 879 F.2d at 547).

In this case petitioner presented testimony from his expert, Dr. Edgar Butler, establishing that at the most Hispanic jurors were underrepresented by 2.8% as a matter of absolute disparity. (RT at 291-372, 530-680.) Such an absolute disparity figure has been found by the Ninth Circuit to be constitutionally permissible. Nelson, 137 F.3d at 1101 (3.9% absolute disparity with respect to Hispanic jurors insufficient to state a Sixth Amendment claim); Esquivel, 88 F.3d at 726-27 (underrepresentation of 4.9% not substantial); Cannady, 54 F.3d at 548 (2.2% to 3.1% disparity for Hispanics failed to state a claim); United States v. Suttiswad, 696 F.2d 645, 649 (9th Cir. 1982) (7.7% absolute disparity constitutionally permissible); Kleifgen, 557 F.2d at 1297 (2.9% and 4.4% absolute disparities insufficient to state a cognizable claim); see also United States v. Rodriguez, 776 F.2d 1509, 1511 (11th Cir. 1985) ("Although precise mathematical standards are not possible, this circuit has consistently found that a prima facie case of underrepresentation has not been made where the absolute disparity . . . does not exceed ten percent."). Thus, petitioner has failed to

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satisfy the second prong of the test under Duren and respondent is entitled to judgment in his favor as to this claim.[30]

Accordingly, petitioner's motion for summary judgment on this claim should be denied and respondent's motion for judgment in his favor should be granted.

I. Admission of Petitioner's Post-Arrest Statements

In Claim I, petitioner alleges that the introduction of his post-arrest statement taken at the hospital while he was under the influence of morphine violated his rights under the Fifth, Sixth, and Fourteenth Amendments. (Am. Pet. at 78.)

In support of this claim, petitioner alleges that, after having been shot twice during his arrest, he was taken to a hospital for emergency surgery. His injuries were painful. He feared that the police might harm him and asked to have them removed from the emergency room. At 5:31 a.m. he received a 10-milligram injection of morphine. (Id. (citing RT at 407, 695, 709, 724-25 & 889).)

Petitioner alleges that morphine operates on a person's central nervous system, creating a euphoria that takes away the person's perception of pain and of danger, thereby lessening the self-protective instincts. An average person under treatment with morphine would have difficulty understanding a Miranda advisement and perceiving the effect of information given to the police, even though

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[30] In light of petitioner's failure to make the required showing as to the second prong, the court need not reach the issue of whether the third prong of the test (whether underrepresentation is due to systematic exclusion of the group in the jury-selection process) was properly applied. Although the parties have nonetheless addressed the third prong of the test, the court declines to do so.

the person may exhibit no outward signs of intoxication and may appear to understand questions and give appropriate responses. Intravenous injection of morphine has a greater effect on a patient than any other mode of administration. An injection has its peak effect on the patient about one hour after its administering. (Id. at 78-79 (citing RT at 698, 700 & 721-25; People v. Fordyce, 612 P.2d 1131, 1133 (Colo. 1980)).

Petitioner alleges that Detective Bell read him his Miranda rights at 6:32 a.m., when the morphine injection would have been having its maximum effect. Petitioner stated that he would waive his rights. Bell then interrogated petitioner for approximately an hour and ten minutes and, after a break of 15 to 20 minutes, for an additional 20 to 30 minutes. The interrogation occurred prior to petitioner's surgery. Bell testified that petitioner had some difficulty focusing his attention, that Bell had to repeat questions, that petitioner's train of thought would wander, and that the interview was terminated when petitioner no longer appeared to be responsive to questions. (Id. at 79 (citing RT at 436-38, 452-54, 503-04, 514-15, 517-18 & 892).)

Petitioner claims the prosecution failed to meet its burden of showing that his waiver of his Miranda rights was knowing, intelligent, and voluntary and that his statement to Bell was voluntary. Petitioner claims the use of his statement at trial violated his rights to due process and equal protection of the law, to freedom from compulsory self-incrimination, to a reliable determination of his guilt or innocence of capital murder, and to a

fair, reliable individualized, nonarbitrary, and adequately guided determination of the appropriateness of death as the penalty. (Id. at 79-80.)

In his motion for summary judgment on this claim, respondent argues that petitioner's Miranda rights were not violated. Respondent asserts that the material facts concerning petitioner's contact with the authorities and the statements he made before and after his arrest were thoroughly explored by the trial court at the hearing on the Miranda motion. Respondent argues that the facts set forth by the California Supreme Court in People v. Breaux, 1 Cal. 4th at 300-01, are entitled to a presumption of correctness and that petitioner is not entitled to an evidentiary hearing on his Miranda claim because he had a full opportunity to litigate the issue in the trial court, the trial court held a hearing, and the California Supreme Court reviewed and affirmed the trial court's decision. (Alt. Mot. for Summ. J. at 119-21.)

Respondent states that courts determine whether a confession was voluntary and whether a Miranda waiver was knowing and intelligent by looking at the totality of the circumstances. (Alt. Mot. for Summ. J. at 122 (citing Arizona v. Fulminante, 499 U.S. 279, 285-86 (1991); United States v. Bautista-Avila, 6 F.3d 1360, 1365 (9th Cir. 1993).) Respondent argues that the record demonstrates that there was no improper influence on petitioner, his will was not overborne, and he knowingly and intelligently waived his Miranda rights and voluntarily gave a statement to police.

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Respondent contends that petitioner was injected with morphine "a full hour before he was informed of his Miranda rights and an hour and a half before he was interviewed by Detective Bell." (Alt. Mot. for Summ. J. at 124 (citing RT at 438-39, 503, 695-97 & 889; Breaux, 1 Cal. 4th at 300).) The effects of the morphine were estimated to last one to two hours, although Dr. Gylling testified that petitioner told him he had injected heroin earlier that day, which would have caused the morphine to leave petitioner's system faster. (Id. (citing RT at 700 & 722).) Medical professionals testified that when petitioner spoke with Detective Bell he was coherent and understood what was said to him, gave medical staff a detailed history, and was wide awake and responsive. There was testimony that petitioner answered "fairly in-depth questions appropriately and with apparent understanding," his speech was not slurred, and he was competent to give informed consent to surgery. Defense psychiatrist Dr. Mehtani conceded that petitioner was "well versed in the Miranda rights, having exercised them in the prior week when arrested for being under the influence of heroin and while under the influence of heroin." Respondent argues that petitioner's attempt to shift blame for the murder to a non-existent Mexican hitchhiker also demonstrates that petitioner was aware of the nature of Detective Bell's questions. (Id. (citing RT at 405, 407, 414-15, 418-19, 463-64, 690-91, 693 & 888-89; Breaux, 1 Cal. 4th at 301).)

On the basis of petitioner's responses to the situation, the nature of morphine, petitioner's prior experience waiving his rights, and the content of petitioner's statement to Detective Bell,

respondent contends that petitioner's statements were voluntary and his waiver of Miranda rights was knowing and intelligent.

Petitioner opposes respondent's motion and argues that his conviction and sentence must be set aside because his statement made at the hospital under the influence of morphine was admitted at the guilt-phase of his trial even though the prosecution failed to show that his waiver of Miranda rights was knowing, intelligent, and voluntary or that the statement itself was voluntary. Petitioner contends that he is entitled to summary judgment on the undisputed facts or is at least entitled to an evidentiary hearing on this claim. (Opp'n & Cross-Mot. for Summ. J. at 173.) Petitioner relies on the facts alleged in his amended petition and on Detective Bell's testimony before the trial court that petitioner spoke in a soft voice and slowly while being interrogated, that there were some long pauses between petitioner's answers, that those answers were often simply "yes" or "no," and that the interrogation ended because petitioner had nodded off. (Id. at 173-74 (citing RT at 481 & 513-18).)

Petitioner also argues that his waiver of the privilege against self-incrimination was not knowing, intelligent, and voluntary due to his ingestion of drugs. Petitioner does not claim that Detective Bell coerced his statements. Rather, petitioner urges the court to consider the decision in People v. Fordyce for its discussion of the effects of morphine on the ability of a patient to make a knowing and intelligent decision to make a statement to police

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officers or, in the alternative, to hold an evidentiary hearing on this issue. (Id. at 175-76.)

Petitioner contends that the circumstances in Fordyce and this case were very similar: morphine was given in a dosage effective to take the edge off the patient's pain (612 P.2d at 1133; RT at 408 & 699), doctors testified that at the time of the patient's statements to police the patient appeared to be oriented as to person, place, and time (612 P.2d at 1133; RT at 401-02), and other witnesses testified that the patient appeared to be reasonable and able to follow directions (612 P.2d at 1133) or was coherent, rational, and responsive during interactions (RT at 894-95). In Fordyce, an expert toxicologist testified that an effective dose of morphine creates a euphoria which takes away the perceptions of pain and danger, thereby lessening the self-protective instincts, although the patient may exhibit no outward signs of intoxication. An effective dose of morphine also interferes with short-term memory, so that "[a]n average person under treatment with morphine would have difficulty understanding a Miranda advisement and perceiving the important effect of information given to the police" (612 P.2d at 1133). The Colorado Supreme Court found that apparently rational behavior can be consistent with an effective dose of morphine and that the specific and predictable effects of morphine on the central nervous system may cause the patient to be sufficiently impaired to render any statement involuntary. The court ruled that the defendant's statements to police were inadmissible because her waiver of the Fifth Amendment privilege against self-incrimination was not

knowing, intelligent, and voluntary. There was no testimony by an expert toxicologist in petitioner's case, and the testimony of defense expert Dr. Mehtani and prosecution witnesses did not focus on the specific effects of morphine on petitioner's will. (Id. at 176-77.)

Petitioner suggests that this court "can benefit" from the expert toxicologist's testimony in Fordyce or, in the alternative, should order an evidentiary hearing at which "an expert toxicologist or pharmacologist could testify so that this court may assess whether the morphine administered to [petitioner] was sufficient to render his Miranda waiver invalid and subsequent statements inadmissible." (Id. at 177.)

Petitioner claims the state court record demonstrates that the morphine administered to him rendered him incapable of understanding either the Miranda advisement or the consequences of waiving his Miranda rights. In this regard, petitioner views the testimony of Dr. Gylling, Dr. Gage, Nurse Lords, and Detective Bell as evidence that the intravenous administration of morphine transformed him within an hour from a belligerent, aggressive, rude and uncooperative individual who was afraid of the police into a soft-spoken cooperative individual who was willing to respond to a detective's interrogation without counsel present. Petitioner contends that it is reasonably probable that his waiver of his Fifth Amendment rights resulted from morphine's having taken away his perception of danger and reduced his self-protective instincts, making it difficult for him to perceive the effect of the information

he gave to the police. Petitioner asserts that there is no persuasive evidence to the contrary. (Id. at 178-79.)

Petitioner cites Pierce v. Cardwell, 572 F.2d 1339, 1341 (9th Cir. 1978), for the proposition that a claim of intoxication, if proved, entitles the petitioner to relief. The petitioner in Pierce alleged that he was suffering from intoxication caused by the combined effect of alcohol and Valium. The court held that the alleged intoxication, if established as fact, may have made the petitioner incapable of a voluntary, knowing, and intelligent waiver. Petitioner also relies upon the decision in Gladden v. Unsworth, 396 F.2d 373, 379-81 (9th Cir. 1968), in which the court discussed the constitutional dangers that arise when a defendant's statement is made while intoxicated and recognized that intoxication prevents an individual from exercising his rational intellect or his free will. (Id. at 179-80.)

Finally, petitioner argues that the erroneous admission of his statement was prejudicial in both phases of his trial. In his statement to Detective Bell, petitioner said he had used heroin on the day he was shot but did not mention cocaine. Petitioner gave a detailed description of a third-party perpetrator, a "Mexican hitchhiker." The defense theory at trial, supported primarily by the testimony of Dr. Rosenthal, was that petitioner was so intoxicated on cocaine that he was unable to premeditate or deliberate the killing or form the specific intent to kill. The prosecutor attacked Dr. Rosenthal's testimony by establishing during cross-examination that the testimony depended entirely on Dr. Rosenthal's accepting as true

the statements made to him by petitioner. In closing argument, the prosecutor emphasized that Dr. Rosenthal's opinion was based on petitioner's story and pointed to petitioner's statement to Detective Bell, in which he made no mention of cocaine, did not claim that he shot Connie Decker in a state of cocaine-induced rage, and instead claimed a Mexican hitchhiker killed her. Thus, petitioner argues, admission of petitioner's hospital statement allowed the prosecutor to undermine petitioner's credibility and therefore the validity of Dr. Rosenthal's opinion, leaving petitioner effectively without a defense. Petitioner asserts that the effect was compounded in the penalty phase by the possibility that the jury viewed petitioner's story of a Mexican hitchhiker as a calculated and callous attempt to avoid responsibility for the killing. Petitioner concludes that the admission of his hospital statement at trial was both erroneous and harmful, entitling him to either summary disposition in his favor or an evidentiary hearing. (Id. at 180-82.)

In reply and in opposition to petitioner's cross-motion, respondent asserts that petitioner appears to have abandoned his argument that his hospital statement was involuntary and is now relying instead on Miranda grounds. Respondent reiterates that the voluntariness of petitioner's hospital statements was determined by the state courts. Respondent characterizes petitioner's assertion of the effect of morphine to reduce anxiety as a new approach to the facts but one that fails to undermine the validity of petitioner's waiver, particularly in light of the state courts' determination, based on an evidentiary hearing, that the effects of morphine had

worn off by the time of the questioning and that petitioner was not significantly under the influence of morphine. Respondent cites the trial court's rejection of the testimony of defense witness Dr. Mehtani and the express finding that there was "no indication of undue pressure. No indication of - that drugs or fear or loss of sleep were influencing his decision." Respondent contends that petitioner is implicitly requesting judicial notice of evidentiary matter regarding morphine as set forth in the Colorado Supreme Court opinion and that such evidence would be improper new evidence under Keeney v. Tamayo-Reyes. Respondent argues that petitioner has offered nothing that overcomes the presumption of correctness under former 28 U.S.C. § 2254(d) and that Claim I should be rejected. (Resp't's Reply at 26-27 (citing RT at 1604).)

In reply, petitioner denies that either his evidence or his approach is new. Petitioner asserts that the very evidence alluded to, along with a virtually identical argument, was presented to the California Supreme Court in 1991 on direct appeal. Petitioner contends that he claimed then, as he does now, that his waiver was invalid because the effects of morphine, as well as shock from his gunshot wounds and the lingering effects of illicit drugs ingested prior to his arrest, made him incapable of acting knowingly, intelligently, and voluntarily. Petitioner contends that respondent misstates the degree to which this court owes deference to the trial court's factual findings made after a hearing and argues that the material facts were not adequately developed at that hearing because there was no expert testimony regarding the effects of morphine on

voluntariness. Petitioner further argues that the record as a whole supports a finding that he was under the influence of morphine when he waived his rights and that respondent has disputed neither the facts relied upon in petitioner's cross-motion or the expert testimony in Fordyce. (Pet'r's Reply at 43-45.)

At oral argument, the court inquired of petitioner's counsel whether petitioner has abandoned the argument that his statement was involuntary and now relies completely on Miranda, as respondent argued. (Tr. of Oral Argument July 10, 2001, at 32.) Petitioner's counsel observed that the distinction between "involuntary and Miranda" and between "14th Amendment v. 5th Amendment" is difficult to sort out due to the fact that much of the jurisprudence on voluntariness predated Miranda. Counsel stated that petitioner continues to rely on the Fourteenth Amendment as well as the Fifth Amendment and has not abandoned the claim that his statement was involuntary. Counsel also asserted that petitioner "was under the influence of a lot more than morphine and we may need additional evidence on that influence." (Id. at 32-33.)

In his post-arrest statement to Detective Bell in the hospital, petitioner stated that he kidnapped Connie Decker for a joy ride. (Alt. Mot. for Summ. J. at 23 (citing RT at 4428).) Petitioner said he got into Ms. Decker's car, held a gun on her, and demanded that she drive away; directed her to stop in a parking lot, traded seats with her, and drove away with her in the passenger seat; picked up a Mexican hitchhiker; left Ms. Decker with the hitchhiker while he went for a drive; found only the Mexican when he returned

and was told by the Mexican that he had shot Ms. Decker and put her in a dumpster; drove away with the Mexican; later contacted the Mexican and, with the Mexican's help, moved Ms. Decker's body to another location; took Ms. Decker's purse and sold it, and took a credit card from the purse and tried to use it. (Alt. Mot. for Summ. J. at 21-23 (citing RT at 4402-10, 4416-19, 4422-24, 4426-28, 4560).)

Although petitioner did not confess to the killing, the same analysis applies to direct confessions, statements that amount to admissions of part or all of an offense, and statements that purport to be exculpatory but are used by the prosecution to impeach the defendant's testimony at trial or to prove his guilt by implication. See Miranda v. Arizona, 384 U.S. 436, 476-77 (1966); Gladden v. Unsworth, 396 F.2d 373, 375-76 (9th Cir. 1969).

Petitioner's challenge to the introduction of his post-arrest statement has been presented under the Fifth and Fourteenth Amendments.[31] In Dickerson v. United States, the Supreme Court traced the history of the law governing the admission of confessions, observing that

> [p]rior to Miranda, we evaluated the admissibility of a suspect's confession under a voluntariness test. The roots of this test developed in the common law, as the courts of England and then the United States recognized that coerced confessions are inherently untrustworthy. Over time, our cases recognized

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[31] Petitioner asserts in his amended petition that the introduction of his post-arrest statement at trial violated his rights under the Fifth, Sixth, and Fourteenth Amendments. The parties have not argued and the undersigned does not discern a Sixth Amendment basis for petitioner's claim that his statements should not have been admitted at trial. (See Am. Pet. at 78.)

two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment.

. . . [F]or the middle third of the 20th century our cases based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process. We applied the due process voluntariness test in "some 30 different cases decided during the era that intervened between Brown [decided in 1936] and Escobedo v. Illinois" [decided in 1964]. Those cases refined the test into an inquiry that examines "whether a defendant's will was overborne" by the circumstances surrounding the giving of a confession. The due process test takes into consideration "the totality of all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation." The determination "depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing."

We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily. But our decisions in Malloy v. Hogan [in 1964] and Miranda [in 1966] changed the focus of much of the inquiry in determining the admissibility of suspects' incriminating statements. In Malloy, we held that the Fifth Amendment's Self-Incrimination Clause is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the States. We decided Miranda on the heels of Malloy.

In Miranda, we noted that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion. Because custodial police interrogation, by its very nature, isolates and pressures the individual, we stated that "[e]ven without employing brutality, the 'third degree' or [other] specific stratagems, . . . custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." We concluded that the coercion inherent in custodial interrogation blurs the

> line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be "accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself." Accordingly, we laid down "concrete constitutional guidelines for law enforcement agencies and courts to follow." Those guidelines established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings. These warnings . . . have come to be known colloquially as "Miranda rights" . . . .

Dickerson v. United States, 530 U.S. 428, 432-35 (2000) (citations and footnote omitted).

The Miranda guidelines arose from the Court's concern "that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt." Id. at 442 (citing Miranda, 384 U.S. at 457). "[S]omething more than the totality test was necessary" to prevent the use of unwarned statements as evidence in the prosecution's case in chief. Id. at 442 & 443-44.

In Colorado v. Connelly, 479 U.S. 157 (1986), the Court considered the case of a man who approached police to confess to a murder and did confess after receiving Miranda advisements. It was later determined that the defendant was suffering from a psychosis that interfered with his ability to make free and rational choices and, while not preventing him from understanding his rights, motivated him to confess. Although no police misconduct or coercion occurred, the trial court suppressed the defendant's statements as

involuntary, finding that his mental state vitiated his attempted waivers of the right to counsel and the privilege against self-incrimination. The Colorado Supreme Court affirmed on the grounds that the defendant's mental state interfered with his rational intellect and his free will, that admission of his confession would violate the Due Process Clause of the Fourteenth Amendment, and that the defendant's mental condition precluded him from making a valid waiver of his Miranda rights. 479 U.S. at 160-63.

The Supreme Court reversed, holding that "coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment." Id. at 167.

> Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law. . . . [A]s interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the "voluntariness" calculus. But this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional "voluntariness."

Id. at 164 (footnote and citation omitted). Accordingly, while a defendant's mental condition is relevant to his susceptibility to police coercion, "mere examination of the confessant's state of mind can never conclude the due process inquiry." Id. at 165. With regard to the Fifth Amendment privilege against self-incrimination, the Court likewise held that "[t]he sole concern of the Fifth Amendment, on which Miranda was based, is governmental coercion."

Id. at 170. The voluntariness of a waiver of the Fifth Amendment privilege or of any Miranda right depends on "the absence of police overreaching, not on 'free choice' in any broader sense of the word." Id. at 169-70. See United States v. Kelley, 953 F.2d 562, 565-66 (9th Cir. 1992) (holding that a statement given to police while the defendant was obviously suffering from heroin withdrawal was voluntary and that the circumstances of the interrogation did not reach the requisite level of coercive activity by police necessary to support a finding to the contrary). See also Henry v. Keenan, 197 F.3d 1021, 1026 (9th Cir. 1999); Clabourne v. Lewis, 64 F.3d 1373, 1379 (9th Cir. 1995); United States v. Miller, 984 F.2d 1028, 1030-31 (9th Cir. 1993).[32]

In the present case, petitioner has not alleged and "does not assert that his statements to Detective Bell were coerced." (Opp'n & Cross-Mot. for Summ. J. at 175.) The undisputed facts do not demonstrate that any police overreaching or other governmental coercion occurred in the taking of petitioner's post-arrest statement. Respondent is therefore entitled to summary judgment on Claim I, and petitioner's cross-motion should be denied.

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[32] In People v. DeBaca, 736 P.2d 25 (Colo. 1987) (en banc), the Colorado Supreme Court distinguished People v. Fordyce on the facts but also noted that Fordyce was decided before Colorado v. Connelly and that the court had not addressed "the question whether the police conduct was of the coercive nature required by Colorado v. Connelly as a necessary predicate to a finding of involuntariness under the due process clause of the fourteenth amendment." 736 P.2d at 27-28 & n.3.

J. Prosecutorial Misconduct/Comment on Defense Tactics

In this claim petitioner contends that the prosecutor committed misconduct throughout his guilt-phase closing argument. (Am. Pet. at 80-82.) Specifically, petitioner takes issue with the following portion of that argument:

> One of the things that has occurred in this case, it's been really interesting from my standpoint. I think it's probably been interesting maybe from your standpoint. Fascinating actually.
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> It's been like a law school trial tactics class because one of the things you learn in law school, that you're taught in law school is that if you don't have the law on your side, argue the facts. If you don't have the facts on your side, argue the law. If you don't have either one of those things on your side, try to create some sort of a confusion with regard to the case because any confusion at all is to the benefit of the defense because confusion - -

(Am. Pet. at 80.) Petitioner asserts that this argument to the jury that defense counsel were trained to create confusion with regard to the case, and the trial court's failure to cure the prejudice stemming therefrom, violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights. (Id. at 80-82.)

Respondent contends that this claim is ripe for resolution on summary judgment. Respondent argues that the challenged comment made during the prosecutor's guilt phase closing argument immediately followed, and was in response to, the defense argument in which the prosecutor was accused by defense counsel of "sandbagging," rewarding witnesses for favorable testimony, and making an effort to create a misunderstanding as to the evidence regarding the effects of cocaine. (Alt. Mot. for Summ. J. at 125-26.) Respondent points out that the

trial court overruled defense counsel's objection to the prosecutor's comment, finding that neither side had gone too far. (Id. at 126.) Respondent also notes that this argument was rejected by the California Supreme Court on direct appeal because the prosecutor's single comment was properly understood as cautioning the jury to rely on the evidence introduced at trial. (Id. at 126-27.) Respondent argues that both rulings were correct since the challenged comment was merely a response to defense counsel's argument impugning the prosecutor's integrity, a cautionary instruction was given by the trial court directing the jury to focus on the evidence and not on any personal disagreement between counsel, and the comment did not have a substantial and injurious effect or influence in determining the verdict to the extent of denying petitioner a fair trial. (Id. at 126-27.)

Petitioner also moves for summary judgment in his favor on this claim arguing that: (1) the prosecutor's comment clearly and improperly impugned defense counsel's integrity; (2) the trial court's statement to the jury in overruling the defense objection affirmed the prosecutor's claim that defense attorneys were trained to create confusion; and (3) the error was harmful both as to the guilt and penalty phase verdicts as evidenced by the length and closeness of the jury's deliberations. (Opp'n & Cross Mot. for Summ. J. at 182-84.)

The legal standards generally applicable to claims of prosecutorial misconduct have been addressed in Section B, supra. In short, in considering claims of prosecutorial misconduct involving

allegations of improper argument, the court is to examine the likely effect of the statements in the context in which they were made and determine whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Turner, 281 F.3d at 868; Sandoval, 241 F.3d at 778; see also Darden, 477 U.S. at 181; Donnelly, 416 U.S. at 643. "[I]t 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.'" Darden, 477 U.S. at 181 (citation omitted). The issue is whether the "remarks, in the context of the entire trial, were sufficiently prejudicial to violate [petitioner's] due process rights." Donnelly, 416 U.S. at 639.

It is generally unprofessional and improper for a prosecutor to malign or impugn the integrity of defense counsel in closing argument. See United States v. Rodrigues, 159 F.3d 439, 449-51 (9th Cir. 1998), amended by 170 F.3d 881 (9th Cir. 1999); Williams v. Borg, 139 F.3d 737, 745 (9th Cir. 1998); United States v. Frederick, 78 F.3d 1370, 1379-80 (9th Cir. 1996). However, a prosecutor's comments must be examined in the context of the entire trial and not in isolation. United States v. Robinson, 485 U.S. 25, 33 (1988); Greer, 483 U.S. at 765-66; United States v. Young, 470 U.S. 1, 11-12 (1985).

> In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. Thus the import of the evaluation has been that if the prosecutor's remarks were "invited," and did no more than respond substantially in order to "right the scale," such comments would not warrant reversing a conviction.

Young, 470 U.S. at 12-13. This "idea of 'invited response' is used not to excuse improper comments, but to determine their effect on the trial as a whole." Darden, 477 U.S. at 182 (citing Young, 470 U.S. at 13). While a prosecutor may fairly rebut defense counsel's contentions, United States v. Bagley, 772 F.2d 482, 494 (9th Cir. 1985), the prosecution is not entitled to use improper tactics in response to tactics of defense counsel, Young, 470 U.S. at 7-9.

Here, the prosecutor's comment does not justify the granting of habeas relief. As noted above, the law requires that in assessing whether error of constitutional dimension occurred the prosecutor's comments must be viewed in context. The prosecution's guilt phase closing argument in this case contained no mention of defense counsel or their conduct. (RT at 6454-6520.) In the defense guilt phase closing argument petitioner's counsel chided the prosecutor for "sandbagging" by not talking about "the real facts of this case" and not mentioning the testimony of defense expert Dr. Fred Rosenthal.[33] (RT at 6533.) Defense counsel also suggested that the prosecutor was willing to reward a witness who gave testimony favorable to the prosecution and had elicited misleading testimony calling into question the testimony of a defense witness. (RT at 6547, 6552.) In his rebuttal guilt phase argument the prosecutor addressed involuntary manslaughter, voluntary manslaughter, second

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[33] Dr. Rosenthal was called as a psychiatric expert by the defense. He testified that in his opinion due to petitioner's cocaine use and lack of sleep petitioner did not intend to or premeditate the shooting of the victim but was reacting impulsively and irrationally rather than with deliberation. (See RT at 5307-11.)

degree murder and first degree murder with respect to petitioner's killing of the victim. (RT at 6674.) It was in this context that the prosecutor made the challenged comment. (Id.) Defense counsel objected on the grounds that the argument was in "violation of the Sixth Amendment" and "went beyond the facts on the record." (RT at 6675.) The trial court overruled the objection stating, apparently in response to the second stated basis of the objection, as follows:

> I will instruct the jury, however, that any argument that relates to facts that are not on the record should be disregarded by the jury. At times counsel may make an error, forget what's there and what is not; but they may argue those facts that are on the record, are those facts which are commonly known by all the people. With that explanation, the objection is overruled.

(Id.)

At the next recess, petitioner's counsel reiterated his objection to the prosecutor's rebuttal argument as suggesting defense counsel was engaging in improper conduct, thereby denying petitioner his Sixth Amendment right to effective assistance of counsel. (RT at 6679.) Counsel requested that the prosecutor be instructed not to again attack the character of defense counsel. (Id.) The trial court denied the request, stating:

> Very common in trials. There is fairly wide latitude given to counsel in their argument. They do not have to be complete gentlemen. And I believe that I heard defense counsel impugn the motivation of the prosecution for testimony - or argument that they made. And again, this is - this is the observation and opinion of counsel in an adversary type position. I don't think it has gone too far. Of course there are bounds upon

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> that. But I don't think that it has gone to the point where it would deprive Mr. Breaux of his Sixth Amendment rights.

(RT at 6682.) Defense counsel's motion for a mistrial on this basis was also denied. (Id.) The court's jury instructions included the pattern instruction that statements made by the attorneys are not evidence. (RT at 6733.)

The undersigned does not agree with the trial court's characterization of the prosecutor's comment as "very common." Nor was the prosecutor's comment clearly intended to merely caution the jury to rely on the evidence introduced at trial. The comment, though brief and isolated, also suggested to the jury that defense counsel had been trained to confuse the jury because confusion was always to the benefit of the defense. The argument was therefore improper. See Rodrigues, 159 F.3d at 449-51 (prosecutor's comment that defense counsel had "tried to deceive [the jury] . . . about what this case is really about" found to be a false accusation and "a gratuitous attack on the veracity of defense counsel" that distorted the trial process); Frederick, 78 F.3d at 1379-80 (prosecutor's argument "complimenting" defense counsel for confusing a prosecution witness on cross-examination found to be improper). However, despite the impropriety in this case, there is no constitutional error justifying the granting of habeas relief unless the comment was prejudicial to the point of denying petitioner a fair trial. Darden, 477 U.S. at 181; Turner, 281 F.3d at 868; Rodrigues, 159 F.3d at 449-51; Williams, 139 F.3d at 745. In this case the comment at issue was brief and isolated and certainly was not the predominant theme of the

prosecutor's rebuttal argument. Defense counsel objected to the argument and, although the objection was overruled, the trial court advised the jury that any argument relating to facts not established by the evidence should be disregarded. The jury was later instructed that the arguments of counsel were not evidence. While these instructions were not particularly focused on the nature of defense counsel's objection, they nonetheless suggested that counsel's argument should be viewed as merely that. Moreover, to some extent the comment did suggest a focus on the evidence even though the prevailing implication was that defense counsel was seeking to create confusion. Finally, defense counsel in his closing argument told the jury that the prosecutor was "sandbagging," not addressing the "real facts of this case" and suggested that the prosecutor had elicited misleading testimony in attacking the defense case. Such comments by the defense invited some response, thus supporting the conclusion that the prosecutor's improper comment did not have the effect of denying petitioner a fair trial. See Darden, 477 U.S. at 181-82.

Accordingly, as to this claim petitioner's motion for summary judgment should be denied and respondent's motion granted.[34]

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[34] This case is distinguishable from Bruno v Rushen, 721 F.2d 1193 (9th Cir. 1983), upon which petitioner relies. In that case the prosecutor argued to the jury that defense counsel had engaged in witness tampering and had agreed to aid in the fabricating of a defense for the sake of profit. Id. at 1194 & nn.1-3. In addition, the prosecutor openly hinted to the jury that the fact that the defendant had hired counsel was in some way probative of his guilt. Id. at 1194. The court found that error of constitutional dimension had occurred and that the error was not harmless in light of the extensive nature of the improper argument and the fact that the comments were calculated to wrongly impute guilt to the defendant and struck at the heart of the defendant's story. Id. at 1194-95. None

K. Consciousness of Guilt Jury Instruction

Petitioner alleges that the trial court erred in instructing the jury it could consider a defendant's post-arrest false statements (CALJIC 2.03) and efforts to conceal evidence (CALJIC 2.06) as tending to prove a consciousness of guilt. (Am. Pet. at 82-95.) Petitioner notes that the instructions were given over his objection and asserts that the instructions were irrelevant in the context of this case where petitioner had conceded his guilt on counts two through eight and conceded that he had killed the victim but contested only the allegation that the killing was murder in the first degree. In light of these concessions, petitioner claims that the instructions were unconstitutional in that they encouraged the jury to draw the impermissible inference that such evidence was inculpatory of petitioner on the special circumstances allegations and on the first degree murder charge.

Respondent moves for summary judgment on this claim, arguing that the challenged instructions were properly given since petitioner's acts showed consciousness of guilt with respect to all offenses and special circumstances charged. Respondent also argues that a defendant's post-arrest conduct can be relevant to the state of mind with which an offense is committed. Respondent notes that the California Supreme Court rejected petitioner's arguments on direct appeal on the grounds that: (1) the instructions in question

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of those factors are present here. See Dortch v. O'Leary, 863 F.2d 1337, 1345-46 (7th Cir. 1988) (prosecutor's argument that defense counsel had presented "the biggest snow job in the courtroom" did not deny defendant a fair trial).

caution that such evidence is not sufficient to establish guilt; (2) the instructions do not address the defendant's mental state at the time of the offense and do not compel the drawing of an impermissible inference in regard thereto; and (3) the issue of petitioner's guilt on each of the charges remained before the jury in that petitioner had not pled guilty to any of the charges. See Breaux, 1 Cal. 4th at 304. In addition, respondent contends that the Ninth Circuit has rejected petitioner's argument with respect to CALJIC 2.03 and that CALJIC 2.06 is indistinguishable. See Turner v. Marshall, 63 F.3d 807, 819-20 (9th Cir. 1995), overruled on other grounds by Tolbert v. Page, 182 F.3d 677 (9th Cir. 1999).

Petitioner opposes respondent's motion and moves for summary judgment in his favor on this claim. In doing so petitioner argues that the instructions provided the jury with an improper permissive inference in that they suggested a conclusion could be drawn from evidence that was not justified by reason and common sense. See Ulster County Court v. Allen, 442 U.S. 140, 157-63 (1979). In this regard, petitioner argues that evidence of his post-arrest false statements and his efforts to conceal evidence was not relevant to the only contested issue at trial, whether he was guilty of first degree murder or of some other crime based upon his mental state at the time of the commission of the crime. Petitioner argues that because the facts proved (acts reflecting consciousness of guilt) had no rational connection to whether he acted with deliberation and premeditation, the instructions were given in violation of his right to due process. Finally, petitioner asserts

that the error was prejudicial in that the only issue at trial was his mental state at the time and which was hotly contested, with the length and closeness of the jury deliberations reflecting that the question was a close one.

On direct appeal the California Supreme Court rejected petitioner's challenge to the consciousness of guilt instructions because: (1) the instructions did not address the defendant's mental state at the time of the offense and did not direct or compel the drawing of any inference with respect thereto; and (2) petitioner had not pled guilty to any pending charge and the issue of guilt was before the jury on all of those charges. Breaux, 1 Cal. 4th at 304. The undersigned agrees with that conclusion.

As noted above in Section E, supra, a challenge to jury instructions generally does not state a federal constitutional claim. Middleton, 768 F.2d at 1085; Gutierrez, 695 F.2d at 1197. In order to warrant federal habeas relief, a challenged jury instruction cannot be merely "'undesirable, erroneous, or even "universally condemned,"' but must violate some due process right guaranteed by the fourteenth amendment." Prantil, 843 F.2d at 317 (quoting Cupp, 414 U.S. at 146). To prevail, petitioner must demonstrate that an erroneous instruction "'so infected the entire trial that the resulting conviction violates due process.'" Prantil, 843 F.2d at 317 (quoting Darnell, 823 F.2d at 301). The court must evaluate the challenged jury instructions "'in the context of the overall charge to the jury as a component of the entire trial process.'" Id. (quoting Bashor, 730 F.2d at 1239).

In this case, the court's instructions were as follows:

> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the charge upon which he is now being tried, you may consider such statements as a circumstance tending to prove a consciousness of guilt but it is not sufficient by itself to prove guilt. The weight to be given such a circumstance and its significance, if any, are matters for your determination.
>
> * * *
>
> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by concealing evidence, such attempts may be considered by you as a circumstance tending to show a consciousness of guilt. However, such evidence is not sufficient in itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(CT at 1342-43.)

The Ninth Circuit has upheld instructions such as those at issue here so long as they do not state that the conduct or statement constitutes "evidence of guilt, but merely states that the jury may consider them as indicating a consciousness of guilt." Turner, 63 F.3d at 819-20. The challenged instructions pass muster under that standard. Moreover, despite petitioner's trial strategy not to contest his guilt with respect to the non-homicide charges and the killing (RT at 6521-29), the question of petitioner's guilt as to those charges was still submitted to the jury for decision. Indeed, the trial judge confirmed with defense counsel after jury selection that the defense had "not entered into any stipulations, you have not pleaded guilty, you have not made any admissions in front of the jury." (RT at 4216.) Evidence was admitted at trial from which the

jury could find that petitioner had made false post-arrest statements to police and had attempted to conceal incriminating evidence. (See RT at 4403-28, 4439-40, 4544-47, 4621-24, 4648, 4701-04, 4846-51.) Thus, the instructions were appropriate in light of the pending charges and the evidence admitted at trial.

Most importantly, petitioner has failed to meet his burden of showing that the giving of these instructions "had [a] substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). Even assuming that consciousness of guilt had no relevance in this case given petitioner's concessions at trial, the challenged jury instructions did not require the jury to draw any conclusions. The instructions merely informed the jury that misleading acts or statements "may" be considered as a circumstance tending to show or prove a consciousness of guilt. See Turner, 63 F.3d at 820. Finally, nowhere in closing arguments was it suggested to the jury that finding consciousness of guilt was relevant to determining the degree of petitioner's guilt with respect to the killing. While it may have been preferable for the trial court to have specifically admonished the jury in this regard, petitioner has failed to establish any reason to believe that the jury applied the challenged instructions in a way that violated his due process rights.

Accordingly, with respect to this claim petitioner's motion for summary judgment should be denied and respondent's motion granted.

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L. Petitioner's Competence to Stand Trial

In Claim L, petitioner alleges that he was unable to assist counsel in a rational manner and that his conviction and death sentence therefore violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. (Am. Pet. at 84-92.) The claim is a substantive, as opposed to procedural, incompetence claim.

Respondent contends that nothing proffered by petitioner shows that he was unable to understand the nature and purpose of the proceedings or that he was unable to assist his attorneys.[35] Respondent asserts that petitioner offers no documents in support of this claim and relies on the uncontested facts shown at trial that he used drugs around the time of the charged crimes, that he was in a traffic collision on June 16, 1984, in which he hit his head, that he was shot in the course of his arrest, and that he was given pain medication during treatment for his gunshot wounds, along with the new allegation that he was abused as a child. Respondent argues that the uncontested facts from trial coupled with petitioner's allegations of child abuse are insufficient as a matter of law to

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[35] In Claim L petitioner alleges that he "was incompetent to stand trial, was not capable of understanding the nature and purpose of the proceedings against him, did not comprehend his own status and condition in reference to such proceedings, and also was not able to assist his attorneys in conducting his defense in a rational manner." (Am. Pet. at 85.) In opposition to respondent's motion regarding Claim L, petitioner observes in a footnote that "[m]uch of respondent's briefing on this claim addresses the 'unable to understand the nature and object of the proceedings' prong of the competency test" and declares that "[p]etitioner's claim does not go to this prong of the test." (Opp'n & Cross-Mot. for Summ. J. at 192 n.134.) It appears that petitioner has abandoned his allegation that he was not capable of understanding the nature and purpose of the proceedings against him.

demonstrate a federal constitutional error for which petitioner is entitled to relief. (Alt. Mot. for Summ. J. at 135-37.)

Respondent states that the standard for incompetence to stand trial is whether the defendant's mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense. Respondent acknowledges that a state deprives a defendant of due process if it fails to provide an adequate mechanism for determining whether a defendant is incompetent to stand trial and that a trial court is required to investigate the defendant's competence if a sufficient basis for doubt is shown. Respondent contends, however, that petitioner neither challenges the adequacy of California's mechanism for determining incompetence nor claims that the trial court was required to declare a doubt regarding petitioner's competence based on the information before that court.[36]

Petitioner agrees that there are a number of undisputed facts relevant to this claim, including the facts that petitioner had a history of polysubstance abuse that began when he was nine years old; suffered a head injury in a traffic accident not long before his arrest that went untreated; and was wounded during his arrest and

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[36] Respondent argues at length that the United States Supreme Court has not held that incompetence to stand trial "in itself" warrants federal habeas relief. Respondent concedes that Ninth Circuit opinions have so stated but characterizes those statements as being wrong as a matter of law, arguing that relief may not be granted on this claim under Teague v. Lane. (Alt. Mot. for Summ. J. at 137-42.) See pp. 13-15, supra. Respondent also asserted an abuse-of-the-writ argument in support of his motion for summary judgment on Claim L, but the argument was withdrawn in respondent's reply. (Alt. Mot. for Summ. J. at 136; Resp't's Reply at 7.)

given morphine for the pain. Petitioner contends that all of these facts affected his competency to stand trial but that the primary focus of Claim L is that he was unable to assist in his defense because of the abuse he suffered as a child and because of other factors arising from his family history. Petitioner asserts that it is also undisputed that he did not discuss these matters with his trial counsel, despite repeated questioning, and that his inability to do so can be addressed in the context of an evidentiary hearing on petitioner's claims of ineffective assistance of counsel, if a hearing is held. Petitioner cites the arguments he has offered in support of Claims C and W[37] concerning counsel's awareness of his inability to assist in his defense and counsel's failure: to develop evidence to prove abuse indirectly; to institute competency proceedings; and to secure the services of an expert in child sexual abuse.[38] Petitioner concludes that he is entitled to summary judgment on Claim L or to an evidentiary hearing to resolve any remaining factual issues concerning his competence to stand trial. (Opp'n & Cross-Mot. for Summ. J. at 191-93 & n.135; Ex. UU.)

"The conviction of an accused person while legally incompetent to stand trial is a clear violation of the constitutional

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[37] Petitioner indicates that his amended petition mistakenly incorporates the allegations of Claims C and X into Claim L. Petitioner intended to and did incorporate the allegations of Claims C and W into Claim L. (Opp'n & Cross-Mot. for Summ. J. at 191 n.133.)

[38] Petitioner also argues that respondent's procedural bar arguments, including those relating to Keeney v. Tamayo-Reyes, Teague v. Lane, and the AEDPA standard of review, should all be summarily rejected.

guarantee of due process." Hernandez v. Ylst, 930 F.2d 714, 716 (9th Cir. 1991)(citing Pate v. Robinson, 383 U.S. 375, 378 (1966)). See also Cooper v. Oklahoma, 517 U.S. 348, 354 (1996); Davis v. Woodford, 333 F.3d 982, 999 (9th Cir. 2003); Cacoperdo v. Demosthenes, 37 F.3d 504, 510 (9th Cir. 1994). A defendant is incompetent to stand trial if he lacks sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or lacks a rational as well as factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402, 402 (1960). See also Godinez v. Moran, 509 U.S. 389, 396 (1993); Williams v. Woodford, 306 F.3d 665, 705 (9th Cir. 2002); Hernandez, 930 F.2d at 716 n.2.

The burden of establishing mental incompetence rests with the petitioner. Boag v. Raines, 769 F.2d 1341, 1343 (9th Cir. 1985); Lee v. United States, 468 F.2d 906, 906-07 (9th Cir. 1972); see also Williams, 306 F.3d at 705. In a habeas corpus proceeding, a petitioner is entitled to an evidentiary hearing on the issue of competency to stand trial if he or she presents sufficient facts to create a real and substantial doubt as to competency, even if those facts were not presented to the trial court. Deere v. Woodford, 339 F.3d 1084, 1086 (9th Cir. 2003); Steinsvik v. Vinzant, 640 F.2d 949, 954 (9th Cir. 1981). "A . . . 'substantial doubt' exists 'when there is substantial evidence of incompetence'" Deere, 339 F.3d at 1086 (quoting Cuffle v. Goldsmith, 906 F.2d 385, 392 (9th Cir. 1990)).

It is undisputed that petitioner had a history of substance abuse that began at a young age; that he suffered a head injury in a traffic accident not long before his arrest and the injury went

untreated; that injuries suffered by petitioner during his arrest required hospitalization; and that drugs were administered to him in the hospital and throughout his pretrial incarceration. These factors may have affected petitioner's ability to assist in his defense and when joined with his allegations of child abuse and other adverse factors in his family history create a real and substantial doubt as to whether petitioner was able to assist counsel in his defense.

The court finds that the allegations set forth in Claim L are sufficient to demonstrate a federal constitutional error for which petitioner may be entitled to relief if the allegations are proved. The undersigned, of course, is not suggesting that the allegations and the current record requires the ultimate conclusion that petitioner was not competent to assist in his defense. Rather, taken as a whole, the facts in the record raise sufficient doubt to preclude the granting of summary judgment on the claim. Therefore, Claim L should not be dismissed for failure to allege a constitutional error.[39]

Petitioner, as the moving party on his cross-motion for summary judgment, has not demonstrated that he is entitled to judgment in his favor at the present time. An evidentiary hearing is likely necessary to resolve the truth of petitioner's allegations concerning his inability to assist counsel in his defense. See

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[39] Respondent's arguments concerning Keeney v. Tamayo-Reyes, Teague v. Lane, and the AEDPA standard of review also lack merit.

Deere, 339 F.3d at 1086; Williams, 306 F.3d at 705 (district court conducting evidentiary hearing on petitioner's mental state in conjunction with his ineffective-assistance-of-counsel claims). Accordingly, neither party is entitled to summary judgment in their favor as to this claim.

M. Death Qualification of Jury

In this claim petitioner asserts that prospective jurors were questioned during voir dire regarding their views on the death penalty and, as a result, several prospective jurors who could have otherwise been fair and impartial were excluded because of their views regarding the death penalty. (Am. Pet. at 92-93.) Petitioner alleges that this "death-qualifying" voir dire denied him his rights to a representative jury, an impartial jury, a reliable determination of his guilt or innocence and a fair, reliable, individualized, non-arbitrary and adequately-guided determination with respect to the proper penalty as required under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Respondent moves for summary judgment in his favor on this claim, arguing that the California Supreme Court properly rejected petitioner's argument on direct appeal because the United States Supreme Court has held that the "death qualification process" does not violate a defendant's federal constitutional rights. See Lockhart v. McCree, 476 U.S. 162 (1986). In response, petitioner agrees that United States Supreme Court precedent is adverse to his position with respect to both the fair-cross-section and impartial jury aspects of his claim. See Lockhart, 476 U.S. at 173-84;

Buchanan v. Kentucky, 483 U.S. 402, 414-20 (1987); see also Furman v. Wood, 190 F.3d 1002, 1004-05 (9th Cir. 1999). Thus, petitioner concedes that the relief he seeks on this claim can come only from the United States Supreme Court.

In light of petitioner's concession, respondent's motion for summary judgment should be granted on this claim.

N. Defense Counsel's Concession of Non-Homicide Counts Without Petitioner's Waiver of His Right to a Jury Trial

In this claim petitioner alleges that in closing argument trial counsel improperly conceded petitioner's guilt as to all charges except the murder count. In this regard, petitioner alleges that his trial counsel urged the jury to return guilty verdicts as to those charges, telling the jury that the only question for them to resolve was whether he was guilty of first degree murder, second degree murder or manslaughter. Petitioner alleges that he was unaware his counsel would be conceding his guilt, did not understand his constitutional rights and did not waive, and would not have waived, his constitutional right to trial with respect to those other charges. Thus, petitioner alleges that his counsel's concession of guilt was carried out in violation of petitioner's constitutional rights. (Am. Pet. at 93-95.) Both sides have moved for summary judgment in their favor with respect to this claim.

Respondent argues defense counsel's tactical concession that petitioner was the perpetrator of the charged offenses was reasonable in light of the overwhelming evidence to that effect and did not require that petitioner waive his trial rights. Respondent

notes that a similar contention by petitioner was rejected by the California Supreme Court on direct appeal. Breaux, 1 Cal. 4th at 306-07.

Petitioner opposes respondent's motion and seeks summary judgment in his favor on this claim, arguing that his trial counsel entered a waiver-less, de facto guilty plea on his behalf. Petitioner clarifies that this is not an ineffective assistance claim challenging the tactical decisions of counsel. Rather, it is his claim that: (1) regardless of the evidence and the soundness of the tactical decision, there was an absence of personal, constitutional waivers attendant to the de facto guilty plea as required; and (2) counsel was ineffective in conceding guilt in the absence of such waivers. He contends that the writ must issue as to the seven non-homicide counts to which counsel improperly conceded guilt and that he also suffered prejudice with respect to his first-degree murder conviction since it was based upon the robbery conviction that was infected by the error.

In reply respondent states that petitioner suggests a rule that defense counsel may not make a tactical decision to concede guilt in closing argument as to some charges in urging the jury to return a defense verdict with respect to the remaining charges absent a personal plea waiver from the defendant. Respondent asserts that no such rule exists. Petitioner counters that courts have recognized that guilty plea principles apply to actions by trial counsel that are the functional equivalent to a guilty plea. See Brookhart v.

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Janis, 384 U.S. 1 (1966); Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981).

Beginning with the voir dire of perspective jurors petitioner's trial counsel was straightforward and direct in embracing a guilt phase strategy that would concede guilt on all charges except those posing the threat of a potential death sentence. Thus, counsel stated to the second prospective juror he questioned:

> And you'd learn, when I make my opening statement, Mr. Breaux is charged with eight separate charges.
>
> Mr. Breaux maintains he is not guilty of the charge of first degree murder, but as to the other seven charges, the defendant is going to concede those in this trial.
>
> There's not going to be any contest as to the other seven charges.
>
> Would you tell me what your reaction to knowing those facts is?
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> * * *
>
> As for seven of those eight charges, he's admitting those.
>
> * * *
>
> The defense position would be that it's relevant for you to hear about the seven other crimes so you're going to hear about that. But we're not going to contest the issue of his guilt. In other words, we're going to concede he's guilty.
>
> We feel there's value in the jury hearing that in that that information will be of some assistance in deciding the issues we are contesting.
>
> And so, knowing that, that's our attitude and that, therefore, the prosecution will have to present evidence on those other seven counts, what's your response to knowing that that's our position, that we want you to hear it and, therefore, you'll be required to hear that evidence even though we're not contesting it?

(RT at 2811-13.) Throughout the course of voir dire defense counsel made similar statements regarding the focus of the defense solely on

the first degree murder charge. (See, e.g., RT at 2878, 2991-92, 3028, 3053, 3160, 3222, 3484, 3510, 3600, 3633, 3651, 3710.)

Counsel unequivocally announced the defense trial strategy again at the outset of his opening statement by telling the jury:

> The D.A. has described here this morning some of the evidence that you will hear in this case.
> Let me briefly outline for you the remainder of the evidence that will be presented so you might have a total picture in your mind at the outset.
> The evidence in this case will show that Mr. David Breaux is not guilty of first degree murder, and the evidence will show the special circumstances are not true.
> Mr. Breaux is guilty of all the other charges, the other seven charges. For that reason, many of the witnesses will not be asked any questions or very few questions by myself.
> But we feel it is important that you hear about the facts. Because those facts will be relevant to your determination that Mr. Breaux is not guilty of first degree murder.

(RT at 4287.)

In his opening statement in the guilt phase counsel went on to tell the jury that the evidence would show that petitioner robbed a store where Greg Hardy worked as a clerk, kidnapped Mr. Hardy to delay the report of the robbery to police, robbed Connie Decker, kidnapped her and, in a cocaine-induced frenzy and rage, shot and killed her. (RT at 4293-95.) Petitioner's counsel also stated that the evidence would show that when confronted by police two days later, Mr. Breaux refused to surrender and was in possession of a firearm. (RT at 4297.) Counsel concluded his opening statement by telling the jury that:

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> When all the evidence is in, it will be clear that Mr. Breaux is not guilty of first degree murder and it will also be clear that Mr. Breaux is guilty of second degree murder or manslaughter and all of the other charges.

(RT at 4298.)

Throughout the guilt phase trial petitioner's counsel remained consistent with this announced strategy. Thus, at the conclusion of the guilt phase, counsel returned to the strategy announced in voir dire and in opening statements:

> As I told you at the outset, it's our position that the District Attorney has not proven first degree murder in this case.
>
> And it's our position that the District Attorney has not proven beyond a reasonable doubt and to a moral certainty that the special circumstances are true.
>
> As I told most of you in jury selection, as to all the other charges and allegations against Mr. Breaux, we concede those. And as jurors, when you go back into the jury room, as far as the defense is concerned, you can take the other jury forms and check guilty and not give them any further thought.
>
> What this trial has been about from the very day you entered the courtroom is whether or not Mr. Breaux, at the time he killed this woman, carefully thought about the killing and whether or not it occurred during the course of a robbery as defined within the law.

(RT at 6521.)

Throughout his closing guilt phase argument counsel conceded petitioner's guilt with respect to all charges save for the first degree murder charge.[40] Counsel concluded his argument by

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[40] In this regard, counsel argued that: petitioner was guilty of all of the charges except the murder charge (RT at 6522); the jury instructions were long and complicated but need not concern the jury because Mr. Breaux was guilty of every count and every charge except

focusing, as the defense had throughout, solely on the first degree murder charge which posed the risk of imposition of the death penalty:

> And I'm confident that if you will apply the law in this case that you will find Mr. Breaux is not guilty of first-degree, felony murder and that he is not guilty of deliberate and premeditated murder and that the special circumstances are not true.

(RT at 6658.)

As noted above, petitioner takes the position that in this claim he does not challenge the tactical decisions of counsel as constituting ineffective assistance. The concession is well taken. It has frequently been recognized that conceding guilt as to some counts of a multi-count case to bolster the case for innocence on the remaining counts is, although somewhat unusual, a valid trial strategy which does not necessarily constitute deficient performance by counsel. See Anderson v. Calderon, 232 F.3d 1053, 1087-90 (9th Cir. 2000), cert. denied, 534 U.S. 1036 (2001), abrogation on other grounds recognized by Osband v. Woodford, 290 F.3d 1036, 1043 (9th Cir. 2002); United States v. Swanson, 943 F.2d 1070, 1075-76 (9th Cir. 1991) ("We recognize that in some cases a trial attorney may find it advantageous to his client's interests to concede certain elements of an offense or his guilt of one of several charges."); see also United States v. Holman, 314 F.3d 837, 840 (7th Cir. 2002),

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the murder charge (RT at 6523); after the jurors dealt with the other charges by checking "guilty," the first question they should address is whether Mr. Breaux was guilty of first degree felony-murder (RT at 6534).

cert. denied, ___ U.S. ___, 123 S. Ct. 2238 (2003) (and cases cited therein); Haynes v. Cain, 298 F.3d 375, 382 (5th Cir.) (en banc), cert. denied, 537 U.S. 1072 (2002) (court finding that in conceding guilt as to second degree murder defense counsel adopted a strategy that proved effective in avoiding the death penalty for their client). "Conceding an indefensible charge is thought to build credibility with a jury by acknowledging the overwhelming evidence of guilt for that particular charge, creating goodwill and trust that can be applied towards arguments attacking the remaining charges." Holman, 314 F.3d at 840. See also Anderson, 232 F.3d at 1088-89 (counsel's closing argument crafted to attempt to avoid the possibility of the death penalty found to be a strategic choice that survives review under the Strickland standard). This was an appropriate case for utilization of such a strategy since the evidence on counts two through eight was overwhelming.

Petitioner, however, claims that, regardless of the evidence and the soundness of the tactical decision, this was a de facto guilty plea without the required personal, constitutional waivers and that counsel's concession of guilt in the absence of such waivers constituted ineffective assistance of counsel. This is a more difficult question.

The ultimate decision as to whether to plead guilty or not guilty is left to the defendant. See Brookhart v. Janis, 384 U.S. 1,

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7 (1966); Jones v. Barnes, 463 U.S. 745, 751 (1983).[41] An attorney is required "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Strickland, 466 U.S. at 688.

Although the strategy in question has been approved of by many courts in circumstances similar to those confronted by counsel in this case, it has also been held that "an attorney's concession of a client's guilt without any indication of the client's consent to the strategy is deficient conduct for Strickland purposes." Holman, 314 F.3d at 843. See also Francis v. Spraggins, 720 F.2d 1190, 1194 (11th Cir. 1983) ("Where a capital defendant, by his . . . plea, seeks a verdict of not guilty, counsel, though faced with strong evidence against his client, may not concede the issue of guilt merely to avoid a somewhat hypocritical presentation during the sentencing phase and thereby maintain his credibility before the jury."); Elmer Wiley v. Sowders, 669 F.2d 386, 389 (6th Cir. 1982); Earl Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir. 1981) ("[P]etitioner was deprived of effective assistance of counsel when his own lawyer admitted his client's guilt, without first obtaining his client's consent to this strategy."); Haynes, 298 F.3d at 382 ("[I]t is plausible that the failure of Haynes' attorneys to obtain his consent [in conceding guilt as to second degree murder] might constitute deficient performance under Strickland.").

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[41] Of course, pleading guilty before trial implicates the criminal defendant's right against self-incrimination, the right to a trial by jury, and the right to be able to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243 (1969).

The preferred method of pursuing this defense strategy is for counsel to obtain the defendant's consent on the record in open court, thereby forestalling any issues with respect to consent that may be raised later. See Holman, 314 F.3d at 843; Elmer Wiley, 669 at 389; Earl Wiley, 647 F.2d at 650. An affidavit from the defendant reflecting a knowing and voluntary consent to the strategy would also likely suffice. See Holman, 314 F.3d at 843. Here, there is no indication in the record whether petitioner's counsel had petitioner's consent to pursue this strategy based upon concession of guilt.[42] Petitioner's trial counsel have not addressed this subject in their declarations filed in connection with these habeas proceedings. Whether counsel's performance was constitutionally deficient turns on whether petitioner did in fact consent to this strategy. Under these circumstances additional evidence is required before it can be determined whether counsels' performance was constitutionally deficient. Holman, 314 F.3d at 843 n.4; Elmer Wiley, 669 at 389 ("[W]e remand this case to the District Court for the purpose of conducting an evidentiary hearing to determine whether the petitioner freely and knowingly consented to the trial strategy.")

Finally, respondent argues that petitioner is not entitled to relief with respect to his murder conviction on this claim even if habeas relief was granted on the other charges and the special circumstances. (Opp'n to Cross-Mot. for Summ. J. at 29-30.)

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[42] The most that can be said from the present record is that petitioner was present during voir dire, opening statements and closing argument and did not voice his own objection to his counsel's statements of concession.

Petitioner argues in conclusory fashion that prejudice exists because the constitutional error undermined the robbery verdict which served as the only known basis for the first degree murder conviction. (Opp'n & Cross-Mot. for Summ. J. at 200.)

Assuming the error alleged in this claim is established, in order to be entitled to relief petitioner will be required to establish that he suffered prejudice as a result. Strickland, 466 U.S. at 694; see also Bell v. Cone, 535 U.S. 685, 696-98 (2002) (prejudice presumed only in those extreme cases where counsel fails to oppose the prosecution entirely, not where tactical decisions are made to concede elements of a case to focus on others); Haynes, 298 F.3d at 382. Establishing prejudice may be a difficult task with respect to this claim. However, neither party has addressed the issue sufficiently and the court therefore concludes that neither party has met the burden imposed under Rule 56(c) of showing an entitlement to judgment as a matter of law on this claim. See Calderone v. United States, 799 F.2d 254, 259 (6th Cir. 1986) (moving party who bears the burden of proof must make a showing in support of summary judgment "sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party").[43]

For these reasons the court will recommend that the cross-motions for summary judgment on claim N be denied.

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[43] As noted above, resolution of ineffective assistance of counsel claims often necessitates a hearing on the issue of prejudice. Babbitt, 151 F.3d at 1177; Siripongs I, 35 F.3d at 1314; see also Hoffman, 236 F.3d at 536.

O. Petitioner's Absence From Certain Court Proceedings

In Claim O, petitioner claims his absence from various court proceedings violated his rights under the Fifth, Eighth, and Fourteenth Amendments. Petitioner cites pages 1273, 1277, 1305, 1306, 1307, 1308, 1309, 1424-25, 1451-56, 1547, 1549, 1550, and 1552 of the Clerk's Transcript in support of this claim. Petitioner asserts that absence by waiver in a capital case is a violation of multiple constitutional rights. Citing Claim L, petitioner also claims his oral waiver of personal presence at the specified proceedings was not knowing, voluntary, and intelligent. (Am. Pet. at 95.)

Respondent contends that petitioner's absence from inconsequential trial appearances upon his waiver of presence did not violate his rights. Respondent argues that each proceeding at which petitioner waived his presence occurred outside the presence of the jury and concerned solely procedural matters not requiring petitioner's presence and at which counsel fully represented his interests. Respondent cites the same pages of the Clerk's Transcript relied upon by petitioner. Respondent argues that federal law does not support petitioner's assertion that a defendant in a capital case cannot waive his presence and that therefore petitioner's waiver precludes a finding that his rights were violated. With regard to the allegation that petitioner was incompetent to waive his presence at the specified proceedings, respondent relies on the arguments offered in favor of summary judgment on Claim L. Respondent contends that any relief on Claim O would depend on a new rule that may not be

applied to petitioner under Teague v. Lane. Respondent also contends that petitioner is not entitled to an evidentiary hearing on this claim unless the court intends to consider facts outside the record. (Alt. Mot. for Summ. J. at 146-49.)

In opposition, petitioner concedes that the Ninth Circuit has rejected the contention that waivers of personal appearance are not permitted in capital cases. (Opp'n & Cross-Mot. for Summ. J. at 200 (citing Campbell v. Wood, 18 F.3d 662, 671-72 (9th Cir. 1994) (en banc)). Petitioner contends, however, that he was mentally incompetent to waive his right to be present. Petitioner relies in this regard on the arguments made in opposition to respondent's motion and in support of his own cross-motion on Claim L.

Every person charged with a felony has a fundamental right to be present at every stage of the trial. Illinois v. Allen, 397 U.S. 337, 338 (1970); Campbell, 18 F.3d at 671. This right is guaranteed by the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. United States v. Gagnon, 470 U.S. 522, 526 (1985). The right to be present, like many other constitutional rights, may be waived. See Gagnon, 470 U.S. at 529; Taylor v. United States, 414 U.S. 17, 19-20 (1973); Hayes v. Woodford, 301 F.3d 1054, 1078 (9th Cir. 2002); Brewer v. Raines, 670 F.2d 117, 119 (9th Cir. 1982).[44] The Ninth Circuit has determined that there is "no principled basis for limiting to noncapital offenses a defendant's ability knowingly, voluntarily, and

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[44] A defendant may also lose the right to be present at trial by misconduct. Allen, 397 U.S. at 342-43; Campbell, 18 F.3d at 671.

intelligently to waive the right of presence." Campbell, 18 F.3d at 672. See also Hayes, 301 F.3d at 1078-80 (affirming district court's conclusion following evidentiary hearing that capital case defendant's waiver of personal appearance at the first day of the penalty phase trial was voluntary); Amaya-Ruiz v. Stewart, 121 F.3d 486, 496 (9th Cir. 1997) (finding that the defendant in a capital case voluntarily waived his right to be present at the hearing on aggravating and mitigating factors).

"A waiver is an 'intentional relinquishment or abandonment of a known right or privilege.'" Campbell, 18 F.3d at 672 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). The determination of whether a waiver was knowing and voluntary is a mixed question of law and fact. Id. (citing Terrovona v. Kincheloe, 852 F.2d 424, 427 (9th Cir. 1988)). "The ultimate issue of voluntariness is a legal question requiring independent federal determination." Id. (citing Arizona v. Fulminante, 499 U.S. 279, 286 (1991)). In resolving the issue of voluntariness, a court must "indulge every reasonable presumption against the loss of the constitutional right to be present at a critical stage of the trial." Id. (citing Allen, 397 U.S. at 343). See also Amaya-Ruiz, 121 F.3d at 496.

Respondent's motion for summary judgment on Claim O is perfunctory. Respondent contends that all appearances waived by petitioner were inconsequential, occurred outside the presence of the jury, and concerned only procedural matters not requiring petitioner's presence. Respondent offers no discussion or analysis of the specific proceedings at issue, merely citing the same pages of

the state court record listed in the amended petition. With regard to respondent's reliance on the arguments advanced as to Claim L, the court has determined that an evidentiary hearing is necessary to resolve the truth of petitioner's allegations concerning his inability to assist counsel in his defense. Due to the deficiencies of respondent's motion, the need for an evidentiary hearing with regard to some of the allegations in Claim L, and the presumption against the loss of the constitutional right to be present at any critical stage of the trial, the court finds that respondent has not demonstrated that he is entitled to judgment as a matter of law on Claim O.

Petitioner's cross-motion for summary judgment likewise fails to demonstrate that there exists no genuine issue as to any material fact and that petitioner is entitled to judgment as a matter of law on Claim O. Petitioner claims that his absence from various proceedings was not knowing, voluntary, and intelligent. (Am. Pet. at 95.) He explains the basis for this claim by citing to Claim L, in which he broadly alleges his incompetence to stand trial:

> [Petitioner] was incompetent to stand trial, was not capable of understanding the nature and purpose of the proceedings against him, did not comprehend his own status and condition in reference to such proceedings, and also was not able to assist his attorneys in conducting his defense in a rational manner.

(Am. Pet. at 85.) In the course of briefing the pending motions, petitioner has narrowed this claim. In opposition to respondent's motion for summary judgment, petitioner states that "[m]uch of respondent's briefing on [Claim L] addresses the 'unable to

understand the nature and object of the proceedings' prong of the competency test" and asserts that "[p]etitioner's claim does not go to this prong of the test." (Opp'n & Cross-Mot. for Summ. J. at 192 n.134.) In reply to respondent's opposition, petitioner states further that

> [t]he competency issue here is a relatively narrow and discrete one: petitioner was unable to meaningfully participate in his defense at the penalty phase because he was unable to discuss the abuse he had suffered at the hands of his father, and because trial counsel, knowing to a reasonable certainty that petitioner had, in fact, been abused, failed to obtain the services of an expert who would be able to elicit that information from petitioner.

(Pet'r's Reply at 47.)

Petitioner has disavowed his allegation that he was unable to understand the nature and object of the proceedings and has narrowed his claim of incompetence to the specific issue of his ability to "meaningfully participate in his defense at the penalty phase" because of abuse by his father in conjunction with the other factors noted above in Section L. Assuming for the sake of argument that each court proceeding at issue in Claim O occurred during the penalty phase of petitioner's trial, the court finds that petitioner has made no showing that his waiver of presence from any of the proceedings was not knowing, voluntary, or intelligent due to his history of abuse or that any of the proceedings deprived petitioner of his right to meaningfully participate in his defense. Moreover, there are disputed material facts concerning petitioner' ability to assist counsel in his defense. As the moving party on his cross-

motion for summary judgment, petitioner has not made the required showing and is not entitled to summary judgment in his favor on Claim O.

Accordingly, the motions of both parties for summary judgment as to this claim should be denied.

P. Exclusion of Jurors For Cause Based Upon Death Penalty Views

In Claim P petitioner asserts that the trial court erred when, upon motion of the prosecution, it excused prospective jurors Cara Gehrke, Timothy Grieve, and Isabell Miller because of their views on the death penalty. (Am. Pet. at 95-96.) Petitioner alleges that the record does not show that these jurors' views would have prevented or substantially impaired the performance of their duties as jurors. Petitioner asserts that the trial court's error violated his Sixth, Eighth, and Fourteenth Amendment rights to due process of law and to a fair, reliable, individualized, nonarbitrary, and adequately guided determination of the appropriateness of death as the penalty.

Respondent contends that petitioner's claim is groundless and seeks summary judgment based on the transcript of voir dire. Respondent asserts that petitioner is not entitled to an evidentiary hearing on this claim because it was the subject of a hearing before the trial court and a decision on appeal. (Alt. Mot. for Summ. J. at 150-54.)

Respondent cites Adams v. Texas, 448 U.S. 38, 45 (1980), for "the general proposition that a juror may not be challenged for

cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Respondent relies on Wainwright v. Witt, 469 U.S. 412 (1985), in which the Supreme Court reaffirmed the Adams standard and held that the standard does not require that a juror's bias be proved with unmistakable clarity:

> [D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

469 U.S. at 424-26 (footnote omitted). Respondent states that the Court determined in Witt that the trial court's decision on the juror at issue was fairly supported by the record even though the trial court did not expressly state the standard on which it relied and the prospective juror's statements were ambiguous.

Respondent argues that in this case prospective jurors Gehrke, Grieve, and Miller all made statements that fairly support the trial court's findings of substantial impairment. Cara Gehrke stated at the outset of voir dire that she was against the death

penalty and did not think murder would justify taking a life. (RT at 2358.) When the prosecutor asked her if she really thought she would be able to vote for the death penalty, she answered, "No, I don't think I could." (RT at 2369.) The prosecutor then challenged her for cause under Witt. (RT at 2369-70.) The trial court addressed the challenge as follows:

> The test that we are now operating under is whether or not her views about capital punishment would prevent or substantially impair her performance of her duties as a juror in accordance with the instructions and the oath that she took. . . .
>
> This is one of those instances . . . that a juror, after being talked to by counsel, will take perhaps differing and conflicting types of positions, and the last answer, whether she didn't believe that she could, she didn't say that she believed that she would.
>
> Nevertheless, under the standard of Witt, I can come to the conclusion then, that her - her ability to perform has been substantially impaired.
>
> The Court will so find and the challenge is sustained.

(RT at 2371-72.)

Timothy Grieve stated that he felt strongly about the death penalty and said, "I think it is morally wrong for society to execute someone regardless of the situation." (RT at 3084.) When defense counsel asked Grieve whether there was a possibility that, if all doubt had been removed and the case was egregious enough, he could envision himself voting for the death penalty, Grieve responded "I don't think so. . . . I don't think there is any way I could." (RT at 3088-89.) The trial court sustained the prosecutor's challenge under Witt, finding that "the attitude of this juror makes him

substantially impaired in following instructions of the Court and his oath as a juror." (RT at 3089.)

Isabell Miller stated that she did not know if she could sit on the case and explained, "I wouldn't want to commit anybody to the death chamber. I couldn't have that on my conscience." (RT at 3796, 3802.) When the prosecutor asked her whether she could vote for the death penalty in any case, she responded, "I don't think I could. No." (RT at 3803.) The court, noting an apparent conflict between statements made to the prosecutor and statements made to defense counsel, asked her whether she could consider the evidence and, if proper, vote for the death penalty. (RT at 3804.) She answered, "I don't think I could." (Id.) Defense counsel then asked her whether she could consider voting for the death penalty in an extreme case, if the facts were terrible enough and she felt there had been an inexcusable killing for no good reason, i.e., "just a horrible death for absolutely no acceptable reason." (RT at 3805.) Miller responded, "I don't think so." (Id.) The court then sustained the prosecutor's challenge. (Id.)

Respondent argues that this record shows that all three prospective jurors expressed conscientious objections to the death penalty which demonstrated a substantial reluctance to impose the death penalty. Respondent contends that, although the prospective jurors said they did not "think" they could vote for the death penalty, their statements were absolute expressions that they could never vote for the death penalty. Respondent asserts that such

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statements provided ample support for the trial court's rulings and therefore summary judgment should be granted.

Petitioner also seeks summary judgment on Claim P, asserting that the same record cited by respondent demonstrates that all three prospective jurors were unconstitutionally excluded for cause because of their views concerning the death penalty. (Opp'n & Cross-Mot. for Summ. J. at 201-04.)

Petitioner advances two arguments in support of his cross-motion. First, he argues that jurors cannot be excluded if they are merely indecisive about whether the death penalty will affect them. For this argument, petitioner relies on the decisions in Gray v. Mississippi, 481 U.S. 648 (1987), and Adams, 448 U.S. at 49-50. Petitioner's second argument is that jurors who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law. In support of this argument, petitioner relies on Lockhart v. McCree, 476 U.S. 162, 176 (1986), and Gray, 481 U.S. at 658, 662-63. Petitioner argues that prospective jurors cannot be excluded despite initial responses indicating that they are excludable if further questioning makes it clear that they could set aside their scruples and serve as jurors.

Petitioner contends that both arguments are applicable to prospective juror Cara Gehrke. On initial examination by defense counsel, Mrs. Gehrke stated that she was against the death penalty and did not believe in it. (RT at 2358.) She also said she could

"listen openly, fairly" to the evidence, including penalty phase evidence, and could be "fair minded" in "openly consider[ing]" whether or not the penalty evidence persuaded her one way or another. (RT at 2360-61.) She stated: "I can't say there is no case that I wouldn't, you know, vote for the death penalty," and "I just don't happen to believe in it . . . . But I can't say that I would never." (RT at 2362-63.) She further stated that she could "put aside [her] personal feelings, listen to the evidence, consider the evidence, and be open to the possibility of voting" for either penalty. (RT at 2363.) On examination by the prosecutor, she stated that it "would be hard for me to vote for the death penalty. But, if I was picked as a juror, and I had to do so, then I would put my personal feelings - if that's what you're going to ask me - I would put them aside and I would think nothing about how I felt personally." (RT at 2364-65.) When the prosecutor asked her if she really thought she would honestly consider voting for death, when the penalty decision would be solely up to her, she responded, "That's - that's a hard question. Unless it really, you know, comes up, I can't . . . answer that." (RT at 2366-67.) The prosecutor asked whether she would be able to vote for the death penalty when she didn't believe in it and had been against it for a long time, and she replied, "No, I don't think so." (RT at 2369.)

Petitioner cites the trial court's observation that Mrs. Gehrke had expressed "perhaps differing and conflicting types of positions" as well as the California Supreme Court's finding on direct appeal that Mrs. Gehrke's answers, like those of prospective

jurors Grieve and Miller, were "arguably equivocal." (RT at 2372; Breaux, 1 Cal. 4th at 308-10.) Petitioner contends that the record on voir dire and the findings of both state courts show that Mrs. Gehrke was merely indecisive, like Mrs. Bounds, the prospective juror excluded by the trial court in Gray. The trial court in Gray had excluded Mrs. Bounds after finding that her responses to questions about her views on the death penalty revealed that she was "totally indecisive. She says one thing one time and one thing another." 481 U.S. at 655 n.7. The Supreme Court ruled that such a juror was clearly qualified to be seated as a juror under the Adams and Witt criteria. 481 U.S. at 659. Petitioner argues that the state trial court's finding in this case concerning Mrs. Gehrke's "differing and conflicting types of positions" is essentially the same as the trial court's finding in Gray that Mrs. Bounds "sa[id] one thing one time and one thing another." Thus, petitioner argues, the exclusion of Mrs. Gehrke was no more justified than was the exclusion of Mrs. Bounds in Gray. Petitioner argues further that the exclusion of Mrs. Gehrke was improper because she expressly stated that she could and would put her personal feelings aside for purposes of this case. (RT at 2363-65.) Petitioner contends that Mrs. Gehrke should not have been excluded from the jury because she was willing to set aside her own beliefs in deference to the rule of law and made it clear she could set aside her scruples and serve as a juror. See McCree, 476 U.S. at 176; Gray, 481 U.S. at 658, 662-63.

Next, petitioner offers the following summary of Timothy Grieve's voir dire responses: he felt strongly about the death

penalty, believed it was "morally wrong for society to execute someone regardless of the situation," doubted that he could vote for death even if convinced the defendant was guilty of a reprehensible crime, and said that, despite the possibility that he could change his mind, he did not think there was any way he could vote for death. (RT at 3084-89.) Petitioner offers the following summary of Isabell Miller's voir dire responses: she initially said she "wouldn't want to commit anybody to the death chamber" and "couldn't have that on [her] conscience," but then indicated she could be fair and impartial to both sides in deliberations, said she thought she would be open to the possibility of voting for death depending on the evidence and arguments, said she would do her best to decide for either punishment depending on what she heard in the courtroom and thought that she could do that, responded to the prosecutor's questions by saying she didn't think she could vote for the death penalty in any case and wouldn't want that on her conscience, and told the trial judge she didn't think she could vote for the death penalty even if the facts were terrible. (RT at 3796-3805.) Petitioner contends that this record does not show that either Timothy Grieve or Isabell Miller was substantially impaired in the performance of his or her duties in accordance with the court's instructions and the juror's oath, or that either of them could not temporarily set aside his or her scruples and serve as a juror.

In opposition to petitioner's cross-motion, respondent argues that the words used by the three prospective jurors in their responses during voir dire do not comprise the sole determining

factor. Respondent emphasizes the importance of the trial judge's assessment of each prospective juror's feelings based on his or her statements and all relevant considerations, including demeanor, tone of voice, body language, and other forms of non-verbal communication and indicia of feelings. Respondent asserts that the trial judge must evaluate the credibility of each prospective juror's statements under oath based in large part on observations made during voir dire. Respondent argues that, under Witt, 469 U.S. at 431-35, the trial judge's decisions must be given due deference and should be followed if fairly supported by the record. Respondent contends that where, as here, the trial court's decisions depended on interpretation of a juror's statements, those decisions should be conclusive if rational under the circumstances.

In reply, petitioner asserts that respondent has completely ignored the Supreme Court's holding in Gray, despite petitioner's argument that the exclusion of Mrs. Gehrke is indistinguishable from the exclusion of Mrs. Bounds in Gray, and has also implied that the trial judge's decision to exclude these three prospective jurors is immune to reversal. In addition, petitioner asserts that respondent's characterization of the deference to be accorded to a trial judge's decisions is significantly overstated. Petitioner contends that Gray could not have been decided as it was if the trial judge's decision had been deemed conclusive merely because of the trial judge's opportunity to assess the prospective jurors' statements.

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It is well established that "[t]he State infringes a capital defendant's right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause all those members of the venire who express conscientious objections to capital punishment." Wainwright, 469 U.S. at 416. The Supreme Court so held in 1968 in the context of a challenge to an Illinois statute that permitted trial courts to excuse for cause "any juror who shall, on being examined, state that he has conscientious scruples against capital punishment." Witherspoon v. Illinois, 391 U.S. 510, 512 (1968). In Witherspoon, "nearly half the veniremen . . . were excused for cause because they 'expressed qualms about capital punishment.'" Witt, 469 U.S. at 418 (quoting Witherspoon, 391 U.S. at 513). The Supreme Court in Witherspoon held that a jury obtained under the Illinois statute "would not be the impartial jury required by the Sixth Amendment, but rather a jury 'uncommonly willing to condemn a man to die.'" Id. (quoting Witherspoon, 391 U.S. at 521). The Witherspoon Court concluded that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Witherspoon, 391 U.S. at 522. "[T]he Witherspoon Court also recognized the State's legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially, and who therefore might frustrate administration of a State's death penalty scheme." Witt, 469 U.S. at 416.

In Witt the Court clarified the standard to be used for determining when prospective jurors may properly be excused for cause on the basis of their death penalty views. The Court rejected the standard suggested by dicta in Witherspoon and held that the proper standard is that articulated in Adams v. Texas. 469 U.S. at 418-24. The Court rejected "adherence to a requirement that a prospective juror make it 'unmistakably clear . . . that [he or she] would *automatically* vote against the imposition of capital punishment.'" Id. at 419 (quoting Witherspoon, 391 U.S. at 522 n.21). Instead, "'a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Id. at 420 & 424 (quoting Adams, 448 U.S. at 45).

The Adams test for determining juror exclusion eliminates both "the requirement that a juror may be excluded only if he would never vote for the death penalty" and "the extremely high burden of proof" required to show that a prospective juror would be unable to apply the death penalty under any circumstances. Id. at 421. The standard "does not require that a juror's bias be proved with 'unmistakable clarity,'" for "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." Id. at 424.

This standard "leaves trial courts with the difficult task of distinguishing between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the

facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." Id. at 421. Some prospective jurors "cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear,'" and some jurors "may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." Id. at 424-25. Accordingly, "where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law" and therefore excuses the juror for cause, "deference must be paid to the trial judge who sees and hears the juror," despite a lack of clarity in the printed record. Id. at 425-26.

The Court in Witt addressed at length the question of the degree of deference that a federal habeas court must pay to a state trial judge's determination of juror bias arising from the juror's death penalty views. Id. at 426-30. The Court noted its observation in Patton v. Yount, 467 U.S. 1025 (1984), that

> the question whether a venireman is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind. . . . [S]uch a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations were entitled to deference even on direct review; "[t]he respect paid such findings in a habeas proceeding certainly should be no less."

469 U.S. at 428 (quoting Patton, 467 U.S. at 1038) (footnotes omitted). The Court decided that its holding in Patton "applies

equally well to a trial court's determination that a prospective capital sentencing juror was properly excluded for cause," for the trial judge's "predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record." Id. at 429. A state trial court's findings concerning a prospective juror's bias are therefore factual findings entitled to a presumption of correctness on federal habeas review. Id. at 429, 431. "[T]he question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record." Id. at 434. In order to determine whether the trial court's findings are fairly supported by the record, the reviewing court must consider the entire context surrounding the trial court's exclusion of a prospective juror. Id. at 424-26; see also Darden v. Wainwright, 477 U.S. 168, 176-78 (1986) (noting that the court's "inquiry does not end with a mechanical recitation of a single question and answer" and taking into account the trial court's statements to the entire venire and to other prospective jurors where the entire venire was present throughout the voir dire).

The record in this case shows that prospective juror Timothy Grieve was initially questioned on the morning of November 17, 1986, in a group of four prospective jurors. (RT at 2971-84.) After providing general information about criminal proceedings, the trial judge requested the assurance of each of the four prospective jurors that he or she "will follow the law as I state it to you whether you do agree with it or not." (RT at 2977.) Grieve was the

only one of the four prospective jurors who did not give the court such an assurance, stating instead, "Well, in the sense if it is a capital case I would not be able -- I would have some difficulty with the death penalty." (RT at 2978.) The judge responded, "We'll get to that a little later on and, yes, it is a capital case." (RT at 2978.) The judge then advised the four prospective jurors that they might be questioned individually by the court and the attorneys as to their attitude concerning the death penalty and the alternative penalty of life in state prison without possibility of parole. (RT at 2979.) The judge subsequently asked the four prospective jurors if they could think of any reason why, if chosen to be a juror, they could not be fair and impartial to both sides. Immediately after asking the question, the judge remarked that Grieve had raised an issue in that regard and that they would talk to him about it later. (RT at 2983.)

In the afternoon of November 17, 1986, Grieve was questioned individually. (RT at 3082-89.) After Grieve indicated that he understood defense counsel's prefatory remarks, counsel asked Grieve whether he could listen to each side present its respective positions during the penalty phase of the trial, if the case reached that phase. (RT at 3083-84.) Grieve responded, "Well, listen to them, yes. But --" (RT at 3084.) Defense counsel then said, "Obviously, you feel strongly about the death penalty" and asked Grieve to state what his feelings were. (Id.) Grieve responded, "I think it is morally wrong for society to execute someone regardless of the situation." (Id.) He explained that his feelings were based

on both moral grounds and on practical grounds arising from the fallibility of judges and juries and the resulting possibility of error. Grieve stated that it bothered him that someone who is innocent could be executed. (RT at 3085.) When asked whether his moral scruples were such that he could not consider the possibility of voting for death, even if personally persuaded that a defendant had committed the killing and had done so in an absolutely reprehensible fashion, he answered, "I really wouldn't know, of course, until I was in that situation. But I doubt it." (RT at 3085-86.) Defense counsel rephrased the question, asking again whether it was possible that Grieve could vote for the death penalty in a theoretical case. (RT at 3086.) Grieve responded:

> Uh, again, I'm not sure.
> I could say, by way of example, as a police reporter, I am aware of some pretty heinous crimes.
> And none of the ones I'm aware of really could compel me to vote for the death penalty, even if I believed in the case.
> The man -- decapitation murder in Sacramento a couple of weeks ago, for instance, that has been as heinous as they get.
> And I don't think I would be in support of the death penalty for whoever is found guilty of that.

(RT at 3086-87.) In response to defense counsel's final question concerning the possibility of voting for the death penalty in an egregious case from which all doubt had been removed, Grieve responded,

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> I don't think so. Again, I don't think -- I mean, there is always that possibility that somewhere out there there is going to be something that changes my mind.
>
> But, with everything I know now, I don't think there is any way I could.

(RT at 3087-89.) The trial judge sustained the prosecutor's challenge for cause under Witt, finding that Grieve would be substantially impaired in following instructions of the court and his oath as a juror. (RT at 3089.)

This record reflects that Grieve consistently affirmed and explained his belief that he would be unable to vote for the death penalty. Grieve gave no indication that he could put aside his personal feelings and vote for the death penalty in this case or in any hypothetical case. Significantly, Grieve did not provide assurance that he could follow the law as stated by the court regardless of whether he agreed with it or not. There is ample support for the trial court's finding that Grieve would be substantially impaired in following the instructions of the court and his oath as a juror. The record supports the trial court's decision to excuse prospective juror Grieve for cause.

Prospective juror Isabell Miller was initially questioned on the morning of November 21, 1986, in a group of three prospective jurors. (RT at 3780-94.) Immediately after the group voir dire was completed, Miller was questioned individually. (RT at 3794-3805.) In response to defense counsel's question about her reaction to the possibility of sitting as a juror in the kind of case described by the judge, Miller responded, "I don't know if I could or not" and

explained, "I don't know about being guilty or not." (RT at 3796.) When asked whether it caused her concern that the case involved a charge of first degree murder as well as other charges, she answered in the affirmative and stated, "Well, I wouldn't want to commit anybody to the death chamber. I couldn't have that on my conscience. That's all." (Id.) She responded, "I do" when asked if she had "feelings about the death penalty." (Id.) Defense counsel asked whether she could listen to the evidence fairly during the guilt phase of the trial, to which Miller answered with certainty, "Oh, yes, I could do --." (RT at 3797.) With regard to the penalty phase of the trial, however, Miller answered only "I think so" upon being asked if she thought she could be fair and impartial to both sides. (RT at 3798.) She also answered "I think so" when asked if she thought she could "at least in theory, be open to the possibility of voting for either death or life without possibility of parole depending upon what's been said to you and how you feel after you've heard all that has occurred in the courtroom." (RT at 3799.) In response to defense counsel's inquiry as to whether she could sit as a juror in the penalty phase and decide for either punishment depending upon the evidence, Miller said only that she would do her best. (RT at 3800.)

The prosecutor asked Miller whether she had said she would not commit anybody to the death chamber.

> A. Yes, that's what I said. I wouldn't want it on my conscience.
> Q. Okay. And you also said that you could not have that on your conscience; is that accurate?
> A. That's right.

(RT at 3802.) The prosecutor explained that the court's penalty phase instructions would not tell the jurors how to vote and that it would be up to each juror individually to make the decision, to which Miller responded, "I see." (RT at 3802-03.) Voir dire continued as follows:

> Q. Do you think that you honestly, if the decision was yours to make -- in a jury deliberation, could you, in considering the evidence and considering the instructions, could you really vote for the death penalty in any case?
> A. I don't think I could.
> No.
> Q. And why is that?
> And I'm not challenging you, I'm just asking you why do you think that you don't think that you could?
> A. Well, I wouldn't want that on my conscience. That's why.
> I just -- anything else but the death penalty.

(RT at 3803-04.)

The court attempted to clarify Miller's seemingly contradictory views:

> Q. A minute ago you said, first of all, that you -- that the death penalty would be on your conscience and you didn't think you could put somebody in the death chamber or something like that.
> A. Uh-huh. (In the affirmative.)
> Q. Then Mr. Fathey asked some questions and you said, yes, you could consider and you could vote for the death penalty, and now Mr. Druliner is asking you if you could vote for it and you said you can't vote for the death penalty.
> What is your true feelings?
> Could you consider the evidence, and if it's proper, vote for the death penalty and if it's not, not vote for the death penalty?
> A. I don't think I could. I just don't think I could.

(RT at 3804.) Defense counsel then received the same answer:

> Q. Ma'am, if the case were extreme enough, if the facts were terrible enough and you felt that there had been an inexcusable killing for no good reason, could you consider voting for the death penalty in such a case?
> A. I don't think so.

(RT at 3805.) The court sustained the prosecutor's challenge for cause, finding that Miller was substantially impaired as defined in Witt. (Id.)

Close scrutiny of the record reveals no inconsistency in Miller's opposition to the death penalty. She stated repeatedly that she did not want to commit anybody to the death chamber and could not have such a decision on her conscience. While she was certain she could listen to the evidence fairly during the guilt phase of the trial, all of her answers to defense counsel regarding the penalty phase were equivocal: "I think so" as to her ability to be fair and impartial to both sides when considering the evidence; "I think so" as to her ability to be open, "at least in theory," to the possibility of voting for either death or life without possibility of parole; and "I'd do my best" as to her ability to sit as a juror in the penalty phase and decide for either punishment depending on what she heard in the courtroom. Miller did not state at any time that she could vote for the death penalty. Nor did Miller state that she would put aside her personal feelings and consider the death penalty. When the court asked her to clarify her true feelings and state whether she could vote for the death penalty, she responded that she did not think she could. She gave the same answer to defense

counsel. The trial judge, having satisfied himself that Miller had expressed her true feelings about the death penalty, was justified in finding that Miller's views would have substantially impaired her performance of her duties as a juror. The record supports the trial court's decision to excuse prospective juror Miller for cause.

Prospective juror Cara Gehrke was initially questioned on the afternoon of November 10, 1986, in a group of three prospective jurors. (RT at 2328-41.) Immediately after the group voir dire was completed, Gehrke was questioned individually. (RT at 2341-69.) Defense counsel described the proceedings that would occur during the penalty phase if the defendant were found guilty and asked Gehrke what she thought of the death penalty:

> A. I don't believe in it.
> Q. What do you mean by that?
> A. Well, taking -- I mean, I don't believe in the taking of a life.
> But once they do, I don't think taking another life is going to justify the first one.
> It is not going to bring the victim back.
> And all it is going to do is cause heartache, and that, for the -- you know, for both sides of the families.
> So I'm against the death penalty.
> Q. Have you thought about that for some period of time?
> Your views on it?
> Or have you just thought about it since we have been in court here this afternoon?
> A. No. I felt that way -- I felt that way ever since I can remember.
> I don't -- I don't believe in --

(RT at 2357-58.)

Defense counsel probed further, asking Gehrke first whether she thought she could take an oath saying she would listen openly and fairly; she responded, "Yeah." (RT at 2360-61.) Counsel asked next

whether she could be "a fair-minded person" and listen to evidence meant to persuade her that death is the appropriate penalty; she responded, "Yeah." (RT at 2361.) When counsel asked whether she could not only listen to the evidence in support of both possible penalties but also be a fair-minded person and consider whether or not the evidence persuaded her in one direction or the other, Gehrke answered somewhat equivocally, "Yeah. I think -- yeah." (RT at 2361.) Voir dire continued as follows:

> Q. And then, finally, at some point, the Court would expect of you, and it would be [a] requirement as a juror, if you are sworn to hear this case, to, at least, be open in theory to the possibility of voting either for death or for life in prison without the possibility of parole.
>
> It would not expect you to, in fact, vote one way or the other. Of course, that's up to you to decide that.
>
> But you must, in fact, entertain openly the possibility that you -- forget the possibility -- that you would vote either way notwithstanding your feelings, whether they are strong or otherwise.
>
> Do you think you could do that?
>
> A. Yes. I guess, I could.
>
> Q. Now, let me ask you again, because it is important to all of us.
>
> In saying that yes, you think you could, would you be able to assure his Honor and both of the counsel -- both for the State and for the defense -- that, after having heard the evidence, after having considered it, that, at least, you would consider voting for the death penalty or for life without possibility of parole?
>
> A. Yes.
>
> Q. You are not telling the Court that there is no case -- or are you -- are you telling the Court there is no case that you could envision voting for death?
>
> Or would you have to wait to hear the evidence?
>
> A. No. I can't say there is no case that I wouldn't, you know, vote for the death penalty.
>
> I just don't happen to believe in it.

> But I can't say that I would never.
> . . . .
> Q. It comes down to this, ma'am.
> You need to assure the Court that you could put aside your personal feelings, listen to the evidence, consider the evidence, and be open to the possibility of voting in either direct -- it doesn't -- pardon me?
> A. I was going to say yes. I could do that.

(RT at 2362-63.)

In response to probing by the prosecutor, Gehrke reiterated that she had been against the death penalty for a long time. (RT at 2363-64.) She also stated, however, that she could put her personal feelings aside:

> Q. . . . [B]ased on your initial responses to the question about the death penalty, it appeared that what you were talking about is you don't believe in the death penalty, and you felt that way for a long time?
> A. That's right.
> Q. And --
> A. It would be hard for me to vote for the death penalty.
> But, if I was picked as a juror, and I had to do so, then I would put my personal feelings -- if that's what you are going to ask me -- I would put them aside and I would think nothing about how I felt personally.
> It would be what, you know, I was doing here in court.

(RT at 2364-65.)

The prosecutor explained to Gehrke that the court would give penalty phase instructions concerning the law, that the instructions would only describe the factors to consider, that "what it comes down to is that decision would be your individual decision and the individual decisions of the eleven other jurors," and that her vote would be solely up to her. (RT at 2365-66.)

Q. Now, given that the decision would be yours, don't -- do you think that you would really, honestly consider voting for the death penalty when you know that you could vote for life without possibility of parole and then avoid voting for something that you don't believe in?
A. I -- I -- I don't think I follow you.
I don't know what you mean.
You mean, if the decision was mine and I don't have those other eleven people?
Q. No. What I mean is that your vote in the penalty phase, your vote at any time as a juror, is your vote. Okay?
It is not the person's next to you vote.
Not the judge's vote.
It is yours.
A. Uh-huh.
Q. Okay. Now, assuming you are in the penalty phase of the case, and you have heard all of the evidence, and the judge has explained to you the law of what the various factors are that you can consider -- okay?
A. Yeah.
. . . .
Q. Okay. And when you describe the death penalty as something you don't believe in, obviously, that causes concern. Causes me some concern.
Now, when -- assume that we are in the penalty phase of the case.
In other words, the defendant has been found guilty of murder in the first degree and one or more of the special circumstances have been found to be true.
A. Okay. Yeah.
Q. That's how we get into the penalty phase.
A. (Nodded head.)
Q. That's how we get into the penalty phase.
Now, really, what it comes down to is will you be able to vote for something, that is the death penalty, considering the fact that it's something that you didn't believe in and haven't believed in and you've been against it for just about as long as you can remember?
Do you really think that you would be able to vote for the death penalty?
A. No, I don't think I could.

(RT at 2366-69.)

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Defense counsel objected to the prosecutor's final question and to Gehrke's response to it, on the ground that both were ambiguous. The objection was overruled. Argument was then heard outside Gehrke's presence. The prosecutor challenged the juror pursuant to Witt on the ground that her responses showed that her feelings about the death penalty would prevent or substantially impair her performance of her duties as a juror in accordance with the instructions and the oath. Defense counsel argued that the juror had stated without ambiguity that she could vote for the death penalty if persuaded it was appropriate and that the prosecutor obtained a contrary response by means of a leading question that was awkward and ambiguous. (RT at 2369-71.)

The trial court stated the Witt test, emphasizing the words "prevent or substantially impair," and ruled as follows:

> This is again one of the instances where I mentioned that a juror, after being talked to by counsel, will take perhaps differing and conflicting types of positions, and the last answer, whether she didn't believe that she could, she didn't say that she believed that she would.
>
> Nonetheless, under the standard of Witt, I can come to the conclusion, then, that her -- her ability to perform has been substantially impaired.
>
> The Court will so find and the challenge is sustained.

(RT at 2372.)

The record reflects that Gehrke was consistent in stating that she was against the death penalty, that she didn't believe in the taking of life, and that she had held these feelings for as long as she could remember. The record also reflects that Gehrke was

confident she could take an oath to listen openly and fairly and was equally confident she could listen to evidence meant to persuade her that death was the appropriate penalty. She was less confident, however, that she could consider whether that evidence persuaded her in one direction or the other. In response to defense counsel's increasingly lengthy and confusing questions, she "guessed" she could be open "in theory" to the possibility of voting for the death penalty. In an even less meaningful response, she responded in the affirmative when defense counsel asked her whether she would be able to assure the court and counsel for both sides that, after hearing the evidence and having considered it, she would at least "consider voting for the death penalty or for life without possibility of parole." Gehrke was unwilling to say she would never vote for the death penalty and initially thought she could put her personal feelings aside, listen to the evidence, consider the evidence, and be "open to the possibility of voting." In response to the prosecutor's initial questions, Gehrke repeated that she could put her personal feelings aside and consider the death penalty. However, after the prosecutor described the nature of the decision to be made by jurors in the penalty phase of the trial, Gehrke appeared to be confused. Once she grasped the prosecutor's final question, i.e., whether she really thought she would be able to vote for the death penalty when it would be easy to avoid that course by voting for life in prison without possibility of parole, she answered that she did not think she could vote for the death penalty.

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Gehrke's responses were not "differing and conflicting" when those responses are considered in light of the questions asked. In addition, the trial judge, aided by his ability to assess Gehrke's demeanor, was entitled to resolve any ambiguity arising from her responses in favor of a determination that she would be substantially impaired in following instructions of the court and her oath as a juror. The record therefore supports the trial court's finding of impairment and decision to excuse prospective juror Gehrke for cause.

Petitioner's reliance on Gray in support of this claim is unavailing. The trial judge in that case did indeed state that Mrs. Bounds "is totally indecisive," saying "one thing one time and one thing another." Gray, 481 U.S. at 655 n.7. However, the judge had previously concluded that Bounds was capable of voting to impose the death penalty. Id. at 653. After the prosecutor asked the court for an additional peremptory to use against Bounds, the judge admitted that he had made the State use "about five" peremptory challenges against prospective jurors who were unequivocally opposed to the death penalty. As a means of correcting his errors, the judge caused Bounds to be subjected to further voir dire in the hope that she would "equivocate" so that he could "let her off as a person who can't make up her mind." Id. at 653-54. In response to further questioning, however, "Bounds stated that she could reach either a guilty or not guilty verdict and that she could vote to impose the death penalty if the verdict were guilty." Id. at 654. Despite the absence of any answer that rendered Bounds excludable for cause, the trial judge stated that he had "cheated the State" out of at least

five peremptories and would therefore excuse Bounds for cause. Id. at 654-55 & n.7. The issue before the Supreme Court in Gray was whether the trial court's clearly erroneous exclusion of Bounds for cause should be subject to harmless-error review. Id. at 651. The wholly unsupported exclusion of Bounds for cause bears no resemblance to the exclusion of Cara Gehrke for cause in the present case.

The undersigned finds that respondent has carried his burden as moving party in demonstrating that the trial court's findings of bias were made under the proper standard, that those findings are entitled to deference, and that the decisions to excuse the three prospective jurors are fairly supported by the record. Petitioner has failed to adduce evidence that the trial court's factual determinations were erroneous. Petitioner's cross-motion for summary judgment should therefore be denied, and respondent's motion for summary judgment should be granted on Claim P.

Q. Discriminatory Imposition of the Death Penalty

Petitioner alleges that the trial court violated his rights under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments in summarily rejecting his claim "that the death penalty was discriminatorily imposed on the basis of the victim's race" and in denying petitioner's request for an evidentiary hearing, a continuance, and fees for an expert witness. (Am. Pet. at 96-97.)

Petitioner makes the following allegations in support of this claim: In a motion filed on March 4, 1987, petitioner asserted that the death penalty is discriminatorily imposed on the basis of the victim's race. He requested an evidentiary hearing, along with a

continuance and expert consultant fees. Petitioner offered evidence that, of thirteen cases in which the death penalty was imposed in Sacramento County under California's 1978 death penalty law, eleven of the victims were white, one was Hispanic, and one was Asian. The prosecutor opposed the motion. The trial court denied the motion on the ground that petitioner had made an insufficient showing for relief or for a continuance.

Petitioner claims that the death penalty is discriminatorily imposed in Sacramento County on the basis of the race of the victim and that the trial court's summary denial of his motion and requests for evidentiary hearing, funding, and a continuance denied him his rights to due process and equal protection of the law, to freedom from discrimination on the basis of race, to meaningful access to the courts, to mount a defense, and to a fair, reliable, individualized, nonarbitrary, and adequately guided determination of the appropriateness of death as a penalty. (Am. Pet. at 96-97 (citing CT at 1577; RT at 7471, 7473-75, 7476).) Petitioner contends that his claim is supported by the facts alleged and by other facts to be presented at an evidentiary hearing after full investigation and factual development.

Respondent seeks summary judgment on the ground that statistical evidence is insufficient to establish discriminatory imposition of the death penalty and that petitioner's claim must fail under McCleskey v. Kemp, 481 U.S. 279 (1987), and Harris v. Pulley, 885 F.2d 1354 (9th Cir. 1988). (Alt. Mot. for Summ. J. at 154-60.) Respondent asserts that the material undisputed facts are those

contained in the trial court record. (Id. (citing CT at 1565-77; RT at 7470-76).) According to respondent, the record shows that petitioner presented the trial court with a list of death judgments imposed in Sacramento County between 1978 and 1987, indicating that in eleven cases the victims were white, in one case the victim was Hispanic, and in one case the victim was Asian. At oral argument, petitioner cited an additional case in which the death penalty was imposed and the victims were white.

Respondent argues that petitioner had a full opportunity to litigate this claim in the state courts, a hearing was held, the trial judge determined the pertinent facts and rendered a decision, and the decision was reviewed and affirmed by the California Supreme Court. Respondent asserts that the evidence in the trial court record is the only proper evidence before this court.

Respondent notes that petitioner sought a continuance and expert funding in order to permit Edward J. Bronson to present statistical evidence of discrimination in the imposition of the death penalty. The trial judge was aware that certiorari had been granted in McCleskey v. Kemp and cited several other cases in concluding that "there is not a sufficient showing here that it is proper to grant the motion or for a continuance, and the motion is thus denied." (Alt. Mot. for Summ. J. at 155.) Respondent argues that the trial court's decision to deny both funding and a continuance was correct and that petitioner is not entitled to an evidentiary hearing on habeas review because statistical evidence is insufficient to state a federal claim.

Citing McCleskey, 481 U.S. at 292-93, and Carriger v. Lewis, 971 F.2d 329, 334 (9th Cir. 1992)(en banc), respondent argues that petitioner cannot prevail on a claim of discriminatory application of the death penalty unless he proves that the decisionmakers in his case "acted with discriminatory purpose" that had a discriminatory effect on him. In McCleskey, the Supreme Court considered a study performed in Georgia (the Baldus study) and decided that use of statistics alone will not show discriminatory charging in criminal cases because

> the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII case. In those cases, the statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions.

481 U.S. at 294-95. The Supreme Court noted that the State cannot provide a practical rebuttal to statistical studies in death penalty cases because public policy forbids an inquiry into the decisionmaking process of jurors and because the policy considerations behind a prosecutor's broad discretion makes it improper to require prosecutors to defend their decisions to seek the death penalty. Id. at 296. The Court held that it is unnecessary for the State to rebut a statistical study such as that relied upon by McCleskey because it was apparent from the record that McCleskey had committed an act for which the United States Constitution and the laws of Georgia permit imposition of the death penalty, thereby

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providing a legitimate and unchallenged explanation for the prosecutor's decision. Id. at 296-97.

Respondent also asserts that the Ninth Circuit rejected a similar challenge in 1989 in Harris v. Pulley, where the defendant claimed that California's capital sentencing scheme had been applied discriminatorily based on race, age, and gender and had also been applied arbitrarily and capriciously. The defendant in that case offered two studies of 238 cases involving both homicides and robbery homicides that resulted in the penalty of death in California between 1978 and 1982. The raw numbers indicated that murders involving white victims accounted for 76.5% of all death sentences for intentional homicides in California during the relevant time period, while only 38.7% of the homicides involved white victims. The studies concluded that someone whose victim was white had a five times greater possibility of receiving the death penalty than someone whose victim was not white. The study involving robbery homicides showed that crimes involving white victims accounted for 73% of all death sentences, while only 46.5% of the robbery homicides involved white victims. The study concluded that someone committing robbery murder on a white victim had approximately three times the possibility of receiving the death sentence as someone committing robbery murder on a nonwhite victim. The study also analyzed statistical information based on gender and age. The Ninth Circuit held that the statistical proffer of evidence did not entitle Harris to an evidentiary hearing on his equal protection claim because it was insufficient to show that the decisionmakers in his case acted

with discriminatory purpose. 885 F.2d at 1374-75. The court also rejected the claim that California's capital sentencing system is arbitrary and capricious in its application, holding that the offered study did not prove that the factors of race, gender, and age entered into any capital sentencing decision in California or that any of these elements was a factor in the Harris case. Id. at 1376. The court concluded that the study "does not demonstrate a constitutionally significant risk of racial, gender or age bias affecting the California capital sentencing process." Id. at 1377.

Respondent argues that the courts have effectively foreclosed the use of statistics to prove discrimination or arbitrariness in the imposition of the death penalty. Respondent reasons that the Supreme Court's rejection of the Baldus study, which was extensive, complex, and sophisticated, particularly given the size of the disparities found in the rates in which the Georgia death penalty was imposed, leads to the conclusion that statistical evidence of discrimination or arbitrariness must far exceed that offered in McCleskey to constitute a pattern of discriminatory impact or a constitutionally significant risk of race bias affecting the capital sentencing process. Respondent contends that the evidence submitted by petitioner in this case -- a mere one page chart listing thirteen capital cases tried in Sacramento County between 1978 and 1987 -- falls far short of that submitted in either McCleskey or Harris.

Respondent contends that petitioner has failed to present a colorable factual basis in support of his claim of discriminatory

prosecution or to establish the right to an evidentiary hearing. Citing Williams v. Calderon, 52 F.3d 1465, 1484 (9th Cir. 1995), respondent asserts that a hearing is not appropriate even if the court assumes that petitioner's factual allegations are true, if this court concludes that petitioner cannot establish error or prejudice. In assessing the need for an evidentiary hearing, respondent urges the court not to accept as true or consider allegations that are conclusory, vague, or irrelevant and to consider only allegations supported by specific references to the state trial record or by competent evidence such as affidavits, declarations, and reliable exhibits. Respondent observes that petitioner has not identified with specificity any evidence to be presented at an evidentiary hearing where he would be required to show that the decisionmakers in his case acted with discriminatory purpose. Respondent argues as well that, even if it is true that eleven of thirteen victims were white in capital offenses in Sacramento County during a nine-year period, that fact does not establish purposeful discrimination against petitioner and does not present a colorable showing that racial considerations actually entered into his prosecution.

In conclusion, respondent asserts that the defense motion was not based on specific evidence that the death penalty was imposed in petitioner's case as a result of a discriminatory purpose and that the trial court's ruling on the motion was therefore correct. For these reasons, respondent argues, petitioner was not denied his

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rights to due process and equal protection, and summary judgment should be granted for respondent on Claim Q.[45]

Petitioner opposes respondent's motion for summary judgment on the ground that it is premature. (Opp'n & Cross-Mot. for Summ. J. at 204-06.) Petitioner agrees that under McCleskey and Harris he cannot prevail on his claim of racially discriminatory imposition of the death penalty unless he shows that the decision to prosecute him was based on the victim's race. Petitioner claims he did the best he could with what was available, i.e., he showed that in other capital cases during the same period as his case, the same office had obtained death sentences almost exclusively in cases where the victims were white. Petitioner contends that this evidence leads to a reasonable inference that the race of the victim was a motivating force in the decision to seek the death penalty against him. Petitioner concedes that his evidence was not sufficient to amount to actual proof of the influence of race but argues that it was sufficient "to prove racial influence lay in the hands of the very agencies who were being challenged for bias." (Id. at 205). Petitioner argues that it was the lack of actual proof that led him to seek the aid of the fact-development processes of the state trial court and that the denial of those processes is the reason why such processes are required in this court before the claim is ripe for summary judgment or an evidentiary hearing. Petitioner states that

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[45] Respondent again argues that any relief granted for petitioner on this claim would depend on a new rule that may not be applied to petitioner under Teague v. Lane.

discovery has been authorized concerning prosecuting agencies' capital case standards in at least two other habeas cases in the Eastern District. (Id. at 206 (citing Belmontes v. Calderon, CIV S-89-0736 DFL JFM (San Joaquin County district attorney), and Grant v. Vasquez, CIV S-90-0770 DFL JFM (Shasta and San Bernardino County district attorneys)).)

Petitioner seeks to distinguish his case from McCleskey and Harris by asserting that there are significant differences between the showing made in this case and those made in McCleskey and Harris. Petitioner notes that the showings in the latter cases involved statewide statistics, while petitioner's deals with a single local prosecuting agency over the same time period as his own case. Petitioner argues that, while it made little sense in McCleskey and Harris to infer from statewide statistics that bias was operating in a particular local agency, it makes sense in this case to draw inferences from the conduct of the very agency responsible for prosecuting petitioner. (Id. at 206.)

In reply, respondent maintains that summary judgment is proper because statistical disparity is insufficient to establish a constitutional violation. Respondent renews his contention that petitioner's motion was properly denied because it was based solely upon statistical disparity and the sole purpose of the requested continuance and funding was to present statistical evidence to the state trial court. Respondent argues that petitioner's attempts to distinguish his case factually from McCleskey and Harris are

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unavailing because the legal principles of those cases foreclose petitioner's claim. (Resp't's Reply at 30-31.)

In reply to respondent's reply, petitioner asserts that there are no disputed issues of material fact on Claim Q, that the claim is ripe for resolution, and that summary judgment should be granted in petitioner's favor for the reasons alleged in the amended petition. (Pet'r's Reply at 52.) However, at oral argument, petitioner's counsel cited Claim Q as a claim requiring further factual development and possibly an evidentiary hearing if further factual development is permitted. (Tr. of Oral Argument Heard July 10, 2001, at 20.) Respondent argued that the issue is primarily a legal one and that it is unnecessary to get to "the ultimate evidence" if this court agrees that petitioner failed to make a sufficient showing in the trial court to require the court to exercise its discretion in favor of discovery. (Id. at 39-40.)

It bears repeating that petitioner's federal habeas claim is that the state trial court violated petitioner's constitutional rights by rejecting a defense claim that the death penalty was discriminatorily imposed on the basis of the race of petitioner's victim and by denying the defense requests for an evidentiary hearing, a continuance, and funds for an expert witness. Accordingly, this court's analysis must begin with an examination of the defense motion and requests and the trial court's ruling on them.

On January 6, 1987, the jury rendered a verdict imposing the death penalty on petitioner, and the case was set for further proceedings on January 13, 1987. (CT at 1556-58.) All matters,

including judgment and sentencing, were subsequently continued to March 12, 1987. (CT at 1561.) On March 4, 1987, defense counsel filed a motion titled "Motion for Evidentiary Hearing Prior to Judgment and Sentencing." (CT at 1565.) The purpose of the motion was stated as follows:

> . . . the defendant David Anthony Breaux will move this Court for an evidentiary hearing on his contention that the death penalty is imposed discriminatorily because, with all other things being equal, white victim crimes are more likely to result in the death penalty. . . .
>
> Mr. Breaux will further move this Court for a continuance in judgment and sentencing for a minimum of 90 days and for $3,750 for expert consultant fees in order to prepare Mr. Breaux's effort to persuade this Court that the death penalty is discriminatorily imposed in white victim crimes.

(CT at 1565-66.) The motion was supported by the following brief points and authorities:

> California Constitution; United States Constitution, Eight [sic] and Fourteenth Amendments (Equal Protection and Due Process of Law); McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985), cert. granted, 92 L.Ed.2d 737 (7/7/86).

(CT at 1566.) The motion was also supported by defense counsel's declaration on information and belief that the victim in this case was white and

> there is (a) a significant statistical relationship between the imposition of the death penalty in California in general, and Sacramento County in particular, and in cases in which the crime victim is white, and (b) this statistical relationship is the result of the unconstitutional impact of the race of the white crime victims.

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(CT at 1566.) Counsel declared that he had spoken with Edward J. Bronson, who was capable of acting as an expert consultant and preparing the defense for a McCleskey motion, and that Mr. Bronson was available to work as a consultant in the case. (CT at 1566-67.)

Counsel's declaration cites two exhibits submitted with the motion for evidentiary hearing: Exhibit A, a letter dated February 20, 1987, from Mr. Bronson to defense counsel, and Exhibit B, Mr. Bronson's curriculum vitae. (CT at 1567-76.[46]) In the letter, Mr. Bronson states his understanding that defense counsel's "major concern is that Mr. Breaux's possible death sentence may be the result of a discriminatory process, particularly the race of the victim," and that "[e]arlier motions in the case raised the issue of arbitrariness, focusing on the apparent standardless charging process of the Sacramento District Attorney's Office by way of a discovery motion." (CT at 1569.) Mr. Bronson describes discrimination as "a narrower attack" and discusses such an attack as follows:

> The issue of discrimination in the imposition of the death penalty was recently argued before the United States Supreme Court in McCleskey v. Kemp, a decision that could be coming down at any time. In California the Jackson case, raising similar issues, is now pending before Justice Jefferson, who is taking evidence on the discrimination claim, sitting as a special master.
>
> If discrimination in the administration of the death penalty can be demonstrated, I assume the courts will be willing to strike it down. However, since discrimination, if it exists, is

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[46] The letter from Mr. Bronson appears first in the record but is preceded by a cover page indicating "Exhibit 'B.'" (CT at 1568-70.) Mr. Bronson's curriculum vitae appears second but is preceded by a cover page indicating "Exhibit 'A.'" (CT at 1571-76.)

hardly likely to be avowed, it must be proved empirically in a proper evidentiary hearing. That is not a simple matter.

First of all, one cannot prove discrimination by reference to a single case before the court; one must demonstrate the discrimination by showing a pattern (except in unusual situations like Wheeler). However, mere disproportion is not a sufficient showing, as it might well be in a jury compositional challenge. Therefore, the second requirement would be to show that the disproportion cannot be explained by non-discriminatory reasons.

Among other factors, one should examine such matters as number of victims, prior record of the defendant, relationship of the victim and the accused, etc.

The pool to be surveyed is not just those capitally charged, but those capitally eligible in Sacramento over a period of time, five to seven years.

While there is a large body of research that demonstrates that there is discrimination, especially based on the race of the victim, the research has all been done outside of California. Oddly enough the Bureau of Criminal Statistics of the Department of Justice, which collects a tremendous amount of data, has never cross tabulated the data on victims and offenders. Thus, there is a good deal of information on offenders and on their victims, but nothing to connect the two groups.

I have testified on this issue before (in San Diego), but given the lack of good data, the argument tends to be demonstrated inferentially (discrimination) rather than directly.

If the judge in Breaux is willing to consider evidence on this issue, then I would propose a two- or three-stage process. The first stage would be [to] determine what sources are available to undertake the collection of the necessary data, the extent to which that information is open to me, and its usability. Such sources would include District Attorney files, including their homicide log; Public Defender files; police and probation reports; and newspapers. At that point I could report back to the court on the feasibility of such a study, and its cost.

Such an approach would avoid an undesirable open-ended commitment, in time and money, from

> the court. If the study does prove feasible, I could report back to the court with a preliminary research design and an estimate of time and cost. Progress reports could also be included.

(CT at 1569-70.)

When the motion was argued on March 12, 1987, defense counsel submitted an additional exhibit that was made a part of the record as Exhibit C to the motion. (RT at 7471; CT at 1577.) Counsel described the exhibit as "a one-page sheet that purports to be a compilation of all death penalty verdicts rendered in this county since the law was changed in 1978." (RT at 7471.) Counsel explained the exhibit and argued as follows:

> That sheet breaks down by race and cites the victims in each of those cases. While I don't pretend to this Court to be any expert in knowing exactly whether this is precisely all the cases, to the best of my information and belief it is with one exception. It does not include the name of Gerald Gallego, and if it did, it would note that the race of the victim, the two victims in that case were also white.
>
> As the Court can see, there is no exceptions [sic] other than one, which is the case involving Steven Ainsworth. All of the victims are all white in each and every case that I am aware of that has resulted in a death verdict in this county, and I would point out to the Court it simply buttresses the assertion made in the declaration in support of the motion that there appears to be an appropriate factual basis to conduct an evidentiary proceeding to explore whether or not the province recited in the Baldwin [sic] study that is discussed in detail in the McCleskey opinion.
>
> That's the first point I wanted to make is simply to have this sheet noted as part of our record.
>
> The second thing is, as the Court indicated to us in chambers its tentative feelings about this motion and it noted a California opinion with which I was not familiar that the Court said

> would be inconsistent with the position taken by Mr. Breaux, I point out only the obvious, without having read that opinion, and that is that the U.S. Supreme Court is the final arbiter of the federal constitution, and McCleskey is before the U.S. Supreme Court based upon a very divided Court of Appeals decision.
>
> If the Court has read McCleskey, I am sure it has, it noted that there are eight separate opinions within that one citation and that literally not one Associate Justice joined in the lead opinion without qualification, and while there is a majority in favor of denying the writ filed by Mr. McCleskey, it is only stating the obvious to say that the Court was real divided in its feelings about Mr. McCleskey and McCleskey's contentions. Those factual contentions in that opinion have virtually nothing to do with the State of California, and the reason that we filed the motion the way we have is that we are not suggesting to this Court that we know for a fact there is a problem. What we do know, we ask this Court to acknowledge, is there seems to be a strong basis upon which to go forth with the study. If in fact this law is applied in the way that it's somehow deflected because of the race of the victim, in the words noted even by the lead opinion in McCleskey, the entire statute and its application may be unconstitutional. The only way to intelligently get at that is to study this county and this state, and that's exactly what Dr. Bronson is available to do, and while he is not the end all in this matter -- it's certain that the People would want their own person involved in this, he is the logical and appropriate basis to begin.
>
> I know the Court has read the motion, so this is only repeating what it has a copy of, but, again, we are not asking the Court to make any ultimate ruling about what it should do. We are simply asking for an opportunity to prepare for an evidentiary hearing, and that takes time and a modest amount of money, and that's what we are here asking this Court to do.

(RT at 7471-73.)

Exhibit C to the defense motion for an evidentiary hearing bears the date of February 18, 1987, is titled "Sacramento County

Venue Death Judgments," and is subtitled "Race of Defendants/Race & Gender of Victims." A footnote indicates that this list includes four cases in which venue was changed to Sacramento but does not include two cases in which venue was changed from Sacramento. The list presents the names of thirteen defendants, all of whom appear to be male. Six of the defendants are identified as white, four as black, two as Hispanic, and one as Native American. Ten of the twenty victims[47] are identified as white females and eight as white males. One victim is identified as an Asian female and one as a Hispanic male. (CT at 1577.)

The prosecutor opposed the motion for evidentiary hearing on the grounds that defense counsel had not made a sufficient factual showing and that the motion was untimely:

> The issue that Counsel says he believes applies in this case would have been an issue that has existed, if it exists at all, for years, and I would submit that the motion factually should be denied. There is no support for it. Dr. Bronson doesn't say he can really even do such a study. He says in his letter that he would like to avoid an undesirable open ended commitment in time and money, and I would submit that at this point in time the Court should go forward with the sentencing of the defendant and simply deny the motion. It's inappropriate. Both the victim and the defendant are white. Race was not an issue at all in this case. There was no indication whatsoever that race was an issue. There was no allegation of that at any time. There have been numerous motions litigated in the case, including a recusal motion, and no such allegations were ever made by the defense, so I question the timing and the motive of the motion other than it's [a] delaying tactic, and I

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[47] Six victims are shown for one defendant and two each for two other defendants.

> would submit that factually the motion should be denied.

(RT at 7473-74.)

In response, defense counsel noted that certiorari was not granted in McCleskey until July 6, 1986, while the information was filed in the Breaux case in July of 1984 and the death verdict was not rendered until January of 1987. (RT at 7474.) Defense counsel denied that the motion was brought for the purpose of delay, argued that an earlier-filed motion would have been opposed as premature, and disputed the contention that McCleskey was inapplicable. (Id. at 7474-75.)

After hearing the parties' arguments, the trial court addressed the motion for evidentiary hearing as follows:

> First, the granting of a certiorari by the Supreme Court does not have the effect of changing the law. It has been held in other cases that the granting of certiorari is not the grounds for a trial court to grant any relief. Specifically, it has been held that it's an abuse of discretion for a trial court to grant relief based on the granting of certiorari where it's looking for it by the Supreme Court is the thing to do [sic].
>
> There are several cases that have raised the issues that have come up in McCleskey, and, frankly, the circuits are going in several directions. However, you do have the case of Wicker against McCotter, which I think is a Fifth Circuit case, 1986, 798 Federal 2nd 155. The Court there held where the petitioner was white and also the victim was white, that the petitioner failed to state a claim for relief on the ground he was denied legal protection because the death penalty in Texas here was imposed in race of the victim [sic], specifically saying that the discussions in McCleskey do not apply when you have both the victim and the defendant who is white.

> I'd like to say also that in People against Allen -- see if I can find the citation on that. That's 42 Cal. 3rd 1222, a 1986 decision of the California Supreme Court that held that what they called "intercase" proportionality review is not required. This also indicates because of the rationale in that particular case that was done, McCleskey would not be applicable in California under the California law.
>
> I want to say that I have also read and considered Moore against Blackburn, which is a 1986 case, 806 Federal 2nd 560. It cited some of the studies in this particular area.
>
> Of course, in the Federal Supreme Court at this time, Pulley against Harris has held that the federal constitution was not in a fair proportionality review [sic].
>
> Based on the cases that I have read in the matter, it appears to me that there is not a sufficient showing here that it is proper to grant the motion or for a continuance, and the motion is thus denied.

(RT at 7475-76.) After the court made its ruling, defense counsel clarified for the record that Dr. Bronson was available and prepared to go forward with the proposed study. (RT at 7476-77.)

This record demonstrates conclusively that the defense motion did not present the trial court with a fully developed claim that the death penalty was discriminatorily imposed upon petitioner on the basis of the race of his victim. The defense merely speculated that "all other things being equal, white victim crimes are more likely to result in the death penalty" in California, and on that ground sought a continuance and funding to hire an expert to study the matter in preparation for an evidentiary hearing. (CT at 1566.) Defense counsel freely admitted during oral argument that the factual contentions in the Eleventh Circuit case relied upon by defendant "have virtually nothing to do with the State of California"

and that "the reason that we filed the motion the way we have is that we are not suggesting to this Court that we know for a fact there is a problem." (RT at 7472.) Counsel spoke of the need to "explore" the matter and urged the court to agree that there "seems to be a strong basis upon which to go forth with the study" because the "only way to intelligently get at" possible discrimination in imposing the death penalty "is to study this county and this state." (RT at 7471-73.) Indeed, counsel stated, "[W]e are not asking the Court to make any ultimate ruling about what it should do. We are simply asking for an opportunity to prepare for an evidentiary hearing . . . ." (RT at 7473.)

The expert selected by the defense also recognized the speculative nature of the proposed study. He cited defense counsel's "concern" that petitioner's possible death sentence "may be the result of a discriminatory process" and referred to "discrimination, if it exists." (CT at 1569.) The expert cautioned that "mere disproportion is not a sufficient showing" and described the need to survey "not just those capitally charged, but those capitally eligible in Sacramento over a period of time, five to seven years," along with the need to consider various distinguishing factors in the cases. (CT at 1569-70.) The tentative and preliminary nature of the defense contention is further demonstrated in the expert's statements that the research demonstrating discrimination had all been done outside of California, that there was a lack of good data in California, and that his first task would be to determine the feasibility of conducting a study of discrimination in the state and

in Sacramento County in particular. The expert suggested that, if he determined that such a study was feasible, he would then draw up "a preliminary research design and an estimate of time and cost" for the court's consideration.[48] (CT at 1570.)

The record establishes that the state trial court did not rule on the merits of a claim of discrimination. The court denied only the motion that was before it, finding that the defense had made an insufficient showing to warrant either an evidentiary hearing or a continuance. The trial court properly declined to speculate on what the Supreme Court's ruling might be in McCleskey and noted that the federal circuit courts were not in agreement on the issues raised in that case.

The trial court cited Wicker v. McCotter, 798 F.2d 155 (5th Cir. 1986), in which it was held that the white defendant failed to present a factual issue warranting an evidentiary hearing on his equal protection claim based on allegations that prosecutors in Texas are more likely to charge a defendant with capital murder when the victim is white and that a defendant tried in Texas for the murder of a white person is more likely to be convicted and sentenced to death than a defendant charged with the murder of a person of another race. 798 F.2d at 157.

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[48] It appears that when the prosecutor said "Dr. Bronson doesn't say he can really even do such a study," he was not referring to Dr. Bronson's availability or willingness to do a study but was instead referring to Dr. Bronson's indication that he would begin by determining whether a study was feasible.

The trial court also cited Moore v. Blackburn, 806 F.2d 560 (5th Cir. 1986), in which the appellate court denied the petitioner's application for a certificate of probable cause to appeal the denial of his third federal habeas petition. One of the petitioner's claims was that the death penalty is discriminatorily applied in Louisiana. 806 F.2d at 563. Petitioner sought reconsideration based on two studies that purported to show a greater probability for imposition of the death penalty where the victim of the crime is white. The Fifth Circuit cited its previous decision that no evidentiary hearing was warranted because the statistical tables failed to take into account the statutory aggravating circumstances and were therefore incomplete. 806 F.2d at 564 n.6. The court ruled that the petitioner's inadequate studies failed to bring his claim within the "ends of justice" exception to the bar against successive petitions. 806 F.2d at 564.

In addition, the trial judge cited People v. Allen, 42 Cal. 3d 1222 (1986), in which the California Supreme Court considered whether the state's death penalty statute is unconstitutional for failing to require intercase proportionality review. 42 Cal. 3d at 1285-88. The state's highest court rejected the argument that equal protection principles mandate application of California's disparate sentencing statute to capital cases. The court found that the disparate sentencing statute was adopted to promote uniform sentences in the context of California's determinate sentencing law, while in capital cases

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> the jury has ultimate responsibility for determining if death is the appropriate penalty for the particular offense and offender. In exercising this essentially normative task, it may apply its own moral standards to the aggravating and mitigating evidence presented. It may reject death if persuaded to do so on the basis of "*any* constitutionally relevant evidence or observation." Thus, the "evidence or observation[s]" that persuaded juries in apparently "comparable" cases *not* to assess the death penalty may not be immediately apparent from the record. Under these circumstances, the Legislature could properly conclude that superficial factual similarities among capital cases with opposite sentencing results establish no presumption that the cases in which the more severe sentence was imposed are "disparate."

Id. at 1287-88 (citations omitted). In Pulley v. Harris, 465 U.S. 37 (1984), also cited by the state trial court, the United States Supreme Court had reached the same conclusion, holding that California's death penalty scheme was not rendered unconstitutional by the absence of a provision for proportionality review. See 465 U.S. at 43-44 (ruling that the Eighth Amendment does not require California appellate courts to compare a particular defendant's death sentence with the penalties imposed in similar cases to determine whether the defendant's penalty is disproportionate to the punishment imposed on others convicted of the same crime).

This record does not support a conclusion that the state trial court violated any of petitioner's federal constitutional rights by denying the defense motion for an evidentiary hearing and a continuance. Legally, the motion was supported only by broad constitutional principles and an Eleventh Circuit case in which the defendant's petition for certiorari had been granted. In McCleskey,

the Eleventh Circuit had reversed the district court's order granting habeas relief and held, inter alia, that (1) "proof of a disparate impact alone is insufficient to invalidate a capital sentencing system, unless that disparate impact is so great that it compels a conclusion that the system is unprincipled, irrational, arbitrary and capricious such that purposeful discrimination-i.e., race is intentionally being used as a factor in sentencing-can be presumed to permeate the system"; (2) increased likelihood of a death sentence for a white victim crime is not sufficient to overcome the presumption that the state's death-sentencing process is operating in a constitutional manner; and (3) the statistical studies offered by the petitioner were insufficient to show that his sentence was determined by the race of his victim or even that the race of his victim contributed to the imposition of the penalty in his case. McCleskey v. Kemp, 753 F.2d 877, 892, 897, 898 (11th Cir. 1985), aff'd, 481 U.S. 279 (1987). The Eleventh Circuit's conclusions provided no legal support for the defense motion in this case.

Factually, the defense motion was founded on mere speculation and supported by scanty information about fourteen cases in which the death penalty had been imposed in Sacramento County since 1978. Exhibit C to the defense motion indicates the race of each defendant and each victim, but little else. The list does not account for the distinguishing factors identified by Mr. Bronson as ones that should be examined, such as the prior record of the defendant and the relationship between the victim and the accused. Nor did the defense attempt to place the listed cases in the context

of all cases that were capitally eligible during the same time period. The defense proffer failed to provide a basis for the speculation that "all other things being equal, white victim crimes are more likely to result in the death penalty" in Sacramento County.

On this record, the court finds that the state trial court did not err in denying the defense motion for an evidentiary hearing and a continuance. Respondent is therefore entitled to summary judgment on petitioner's claim of trial court error.

To the extent that Claim Q alleges discriminatory application of the death penalty apart from a claim of trial court error, petitioner has not supported such a claim with evidence other than that previously presented. Even if this court were to deem petitioner's list of thirteen Sacramento County cases, as augmented by the additional name provided at the hearing of petitioner's motion, to be an indication of a discrepancy that correlates to race, the discrepancy is insufficient to support an inference that the decisionmakers in petitioner's case acted with a discriminatory purpose. Cf. Belmontes, 350 F.3d at 892-94 (expert report analyzing prosecutors' charging decisions in 122 death-eligible homicides committed in San Joaquin County over a nine year period which coded data for over 450 variables and reflected the results of numerous logistic regression tests found to support a prima facie showing of unlawful charging discrimination). Absent evidence of discriminatory purpose, a petitioner cannot prevail on a claim of discriminatory imposition of the death penalty. See McCleskey, 481 U.S. at 292-93, 312-13; Belmontes, 350 F.3d at 894-95; Jeffers v. Lewis, 38 F.3d 411,

419 (9th Cir. 1994) (en banc); Carriger, 971 F.2d at 334; Harris v. Pulley, 885 F.2d at 1373-74. Petitioner is not entitled to an evidentiary hearing on the issue because he has not alleged facts which, if proved, would entitle him to relief. See Townsend v. Sain, 372 U.S. 293, 312-19 (1963). Petitioner's claim of discriminatory imposition of the death penalty, to the extent that petitioner has alleged such a claim independent of his claim of trial court error, should therefore be dismissed for failure to state a claim.

R. Prosecution's Use of Peremptory Challenges

Petitioner alleges that his Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated by the prosecution's use of peremptory challenges to exclude potential jurors who expressed reservations about the death penalty. (Am. Pet. at 98-99.) Petitioner claims the prosecutor used his peremptory challenges to produce a jury that was uncommonly willing to condemn a man to death. Petitioner objected during jury selection to the use of peremptory challenges to excuse prospective jurors who expressed reservations about the death penalty, but the trial court overruled the objection on the ground that such persons are not a cognizable group. Petitioner alleges that such persons are a cognizable group which cannot be unfairly excluded from the jury and that the prosecution's misuse of peremptory challenges deprived him of his rights to due process and equal protection of the law, to trial by a fair and impartial sentencer, to not be arbitrarily deprived of life and liberty interests under state law, and to a fair, reliable, individualized, nonarbitrary, and adequately guided determination

that death was the appropriate penalty according to the conscience of the community.

Respondent denies that the prosecutor used peremptory challenges to obtain a jury which was impermissibly biased in favor of a death verdict and disputes petitioner's contentions. Respondent asserts that petitioner is not entitled to an evidentiary hearing on this claim because it was the subject of a hearing before the trial court and a decision on appeal. Respondent contends that he is entitled to summary judgment because petitioner was not denied the right to a fair and impartial trial. Respondent seeks judgment in his favor on the basis of the material undisputed facts included in the trial record of voir dire and the defense motion to dismiss the jury panel due to alleged discriminatory use of peremptory challenges. (Alt. Mot. for Summ. J. at 160-66.)

Respondent notes that the defense motion to dismiss the jury panel alleged discrimination based on race as well as discrimination based on reservations about the death penalty. The motion was directed at peremptory challenges exercised with respect to at least eleven prospective jurors. (Id. at 161-62 & 162 n.86 (citing RT at 4139-42 & 4164-70).) The prosecutor denied that he had excused any prospective juror solely due to the person's feelings regarding the death penalty. As to each minority prospective juror named by defense counsel, the prosecutor stated reasons for excusing each person that were independent of the person's race or ethnic background and also independent of the person's attitude toward the death penalty. The prosecutor stated his reasons for excluding some,

but not all, of the non-minority prospective jurors cited by the defense as having objections to the death penalty. (Id. at 162 (citing RT at 4169-70 & 4175-84).) The trial court found that people "leaning" against the death penalty were not a cognizable group. (Id. (citing RT at 4170-71.) On appeal, the California Supreme Court denied this claim on legal grounds, citing cases in which that court had previously found no constitutional violation for the alleged defect: People v. Gordon, 50 Cal. 3d 1223, 1263 (1990); People v. Turner, 37 Cal. 3d 302, 313-15 (1984). (Alt. Mot. for Summ. J. at 162 (citing Breaux, 1 Cal. 4th at 321).) In Gordon, the court found no constitutional infirmity in permitting peremptory challenges by both sides on the basis of specific juror attitudes on the death penalty:

> While a statute requiring exclusion of all jurors with any feeling against the death penalty produces a jury biased in favor of death, we have no proof that a similar bias arises, on either guilt or penalty issues, when *both parties* are allowed to exercise their equal, limited numbers of peremptory challenges . . . against jurors harboring specific attitudes they reasonably believe unfavorable.

50 Cal. 3d at 1263 (quoting Turner, 37 Cal. 3d at 315, and noting omission of citations).

Respondent argues that peremptory challenges, which are not required by the Constitution, are a means to achieve the end of an impartial jury and can ordinarily be exercised by either side without stating a reason. (Alt. Mot. for Summ. J. at 163-64 (citing Gray v. Mississippi, 481 U.S. 648, 653 (1987); Swain v. Alabama, 380 U.S. 202, 220 (1965)).) Respondent contends that the Sixth Amendment

requirement of a fair-cross-section on the venire is another means of assuring an impartial jury and is not a guarantee of a representative jury. (Id. at 164 (citing Holland v. Illinois, 493 U.S. 474, 480 (1990)). Moreover, respondent argues, women and certain racial groups are the only groups that have been recognized by the Supreme Court as distinctive for purposes of determining whether a defendant has been deprived of a cross-sectional or unbiased jury. (Id. at 164 (citing Holland, 493 U.S. at 478-85; Lockhart v. McCree, 476 U.S. 162, 177 (1986)).) Respondent asserts that the removal of prospective jurors for cause based on their attitudes about the death penalty does not deprive a defendant of a cross-sectional or unbiased jury, and a prosecutor's use of peremptory challenges to eliminate a distinctive group in the community does not deprive the defendant of the Sixth Amendment right to the fair possibility of a representative jury. (Id. at 164 (citing McCree, 476 U.S. at 176-78, and Holland, 493 U.S. at 478).) Respondent concludes that the Supreme Court has squarely rejected petitioner's claim concerning peremptory challenges and that summary judgment in his favor should be granted on this claim.

In opposition, petitioner contends that he is entitled to summary judgment on his claim that the prosecutor committed constitutional error by using peremptory challenges to remove jurors who expressed reservations about the death penalty insufficient to permit them to be excluded for cause. Petitioner states that his claim alleges two alternative theories, with the first theory being that "the prosecutor's actions violated the Constitution's fair-

cross-section requirement insofar as those actions resulted in the exclusion of a cognizable group." (Opp'n & Cross-Mot. for Summ. J. at 206-07.) Petitioner concedes that this ground for relief is precluded by the Supreme Court's decisions in Lockhart v. McCree and Holland v. Illinois. Petitioner's second theory is that the prosecutor's actions "also violated due process, equal protection and the Eighth Amendment because the prosecutor produced a jury that was biased in favor of death." (Opp'n & Cross-Mot. for Summ. J. at 207.) Petitioner contends that he is entitled to summary judgment because he "can show that peremptory challenges resulted in a jury biased in favor of death under the due process clause and the Eighth Amendment." (Id. at 208.)

In support of his alternative theory, petitioner relies on Witherspoon v. Illinois, 391 U.S. 510 (1968), in which the Supreme Court said that a jury from which all persons with reservations about the death penalty have been excluded is "a jury uncommonly willing to condemn a man to die," "a tribunal organized to return a verdict of death," "a hanging jury," and a jury in which the scales are "deliberately tipped toward death." 391 U.S. at 521, 522 n.20, 523. The Supreme Court concluded that the integrity of the process that decided the defendant's fate was necessarily undermined by such a jury and that to execute a death sentence against the defendant in that case would deprive him of his life without due process of law. Id. at 523. Petitioner admits that these pronouncements were made in a case in which prospective jurors had been improperly excluded from the jury by means of challenges for cause rather than by peremptory

challenges. Petitioner argues that the distinction is "of no moment, given what is at stake," and that it cannot matter how the jury came to be a jury uncommonly willing to condemn a man to die. (Opp'n & Cross-Mot. for Summ. J. at 208-09.) Petitioner asserts that his jury was as fundamentally skewed as the jury in Witherspoon and that the Constitution cannot be deemed to tolerate a death sentence imposed under such circumstances.

Petitioner dismisses respondent's reliance on Lockhart v. McCree, asserting that respondent has misstated the ruling of the case. Petitioner asserts that in Witherspoon the Supreme Court determined that a jury was biased at the penalty phase if stripped of jurors who were skeptical of the death penalty but who could judge each case on its merits. In McCree, petitioner argues, the Court merely answered the question left open in Witherspoon, determining that the exclusion of such jurors did not produce a biased jury at the guilt phase. McCree, 476 U.S. at 165. Petitioner argues that no decision of the Supreme Court has rejected or cut back on the holding in Witherspoon that a jury culled of persons skeptical of the death penalty but able to judge the case on its merits is constitutionally biased for purposes of the penalty phase of trial. Petitioner asserts that it is this principle upon which he relies in seeking summary judgment in his favor on Claim R.

Respondent counters that petitioner's alternative argument is meritless. Respondent asserts that in McCree the Supreme Court did in fact hold that "death qualification" does not violate the right to an impartial jury. 476 U.S. at 176-78. Respondent also

contends that petitioner's argument goes well beyond the holding of Witherspoon, in which the Court decided that excusing individual prospective jurors for cause due to bias against the death penalty violated the Sixth Amendment right to an impartial jury. Respondent emphasizes that the Court did not decide in Witherspoon that peremptory challenges based on bias against the death penalty would also violate the Sixth Amendment. Respondent notes that there are major constitutional differences between peremptory challenges and excusals for cause and further observes that the Court's clarifications in Witt contradicted statements in Witherspoon regarding the standard for excusals. Respondent argues also that petitioner's Eighth Amendment claim concerning bias at the penalty phase of his trial cannot be sustained on the basis of the decision in Witherspoon, which concerned the Sixth Amendment, because doing so would constitute a new rule barred by Teague v. Lane.

Respondent contends that, aside from the legal merits, petitioner's alternative argument lacks factual support because the evidence does not show that petitioner's jury was biased. Respondent points to the trial court's determination that the prosecutor had not discriminated on the basis of prospective jurors' views on the death penalty.

In reply, petitioner reiterates both his argument that a jury stripped of all persons with even the slightest skepticism about the death penalty is a "hanging jury" and his argument that McCree is inapplicable to this case because it did not concern the composition of the penalty phase jury. Petitioner denies that a ruling in his

favor on Claim R would violate Teague, arguing that such a ruling would not constitute new law in light of Witherspoon and Batson v. Kentucky, 476 U.S. 79 (1986). Petitioner argues in the alternative that the Teague exception for watershed rules of criminal procedure would apply.

The court turns first to respondent's assertion that Claim R lacks factual support. Respondent has pointed to the state court record of voir dire and the defense motion to dismiss the jury panel due to alleged discriminatory use of peremptory challenges based on prospective jurors' race or opposition to the death penalty. The prosecutor denied having excused any prospective juror solely due to the person's feelings about the death penalty. As to each prospective juror who was a member of a minority group, the prosecutor stated reasons independent of the person's race or ethnic background, and independent of the person's attitude toward the death penalty, for excusing the person. The prosecutor also stated reasons for excluding each of the non-minority prospective jurors cited by the defense as having stated objections to the death penalty. (RT at 4139-42, 4162-89.) The trial court determined that the prosecutor did not exercise his peremptory challenges for the purpose of excluding a constitutionally cognizable group, that petitioner failed to make a prima facie showing of discrimination on the basis of race or ethnicity, and that the prosecutor provided adequate reasons to rebut any inference of discrimination that might be drawn with regard to his exercise of peremptory challenges. (RT at 4170-71, 4184, 4189.)

The court finds that in moving for summary judgment respondent has carried his burden of pointing to those parts of the record that support his contentions with respect to this claim. The burden shifts to petitioner. See Matsushita Elec. Indus. Co., 475 U.S. at 586. Petitioner has not pointed to evidence of discrimination or bias and has not demonstrated that the prosecutor used peremptory challenges to obtain a jury that was biased in favor of a death verdict. In the absence of factual support for Claim R, petitioner is not entitled to judgment in his favor.

Even if petitioner were to come forward with factual support for Claim R, it would be unavailing because the claim is based on a legal theory that lacks merit. Petitioner relies on language contained in Witherspoon v. Illinois, 391 U.S. 510 (1968), in which the Supreme Court held that the State violates a capital defendant's right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause all members of the venire who express conscientious objections to capital punishment. 391 U.S. at 518, 521-22; see also Wainwright, 469 U.S. at 416.

The Supreme Court in Witherspoon addressed an Illinois statute that permitted trial courts to excuse for cause any juror that had qualms about the death penalty. 391 U.S. at 512-13. As petitioner concedes, the Court did not address the use of peremptory challenges to exclude such prospective jurors. Petitioner does not cite any case, or indeed any legal principle, that justifies the extension of Witherspoon's holding to the exclusion of prospective

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jurors by peremptory challenge. Petitioner merely asserts that the distinction is "of no moment, given what is at stake."

Petitioner's assertion flies in the face of the cases discussing and applying the holding of Witherspoon as well as the jurisprudence concerning jury impartiality and the exercise of peremptory challenges. See, e.g., Adams v. Texas, 448 U.S. 38, 45 (1980) (describing Witherspoon and its progeny as a line of cases establishing "the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath"); Batson v. Kentucky, 476 U.S. at 89 (holding that a prosecutor is ordinarily entitled to exercise the allotted number of peremptory challenges for any reason at all but may not challenge potential jurors solely on account of their race); McCree, 476 U.S. at 177-78 (rejecting an impartiality argument based on the theory that excluding prospective jurors with a particular viewpoint results in an impermissibly partial jury); Gray, 481 U.S. at 652 n.3, 667-68 & nn. 17-18 (observing that "peremptory challenges ordinarily can be exercised without articulating reasons," unless a defendant establishes a prima facie case of purposeful discrimination in the prosecutor's exercise of those challenges); Morgan v. Illinois, 504 U.S. 719, 731 (1992) (describing Witherspoon as "a limitation of a State's making unlimited challenges for cause to exclude those jurors who 'might hesitate' to return a verdict imposing death"); United States v. Annigoni, 96 F.3d 1132, 1138 n.8

(9th Cir. 1996) (en banc) ("[T]he sole restriction on the use of peremptory challenges is that neither side may exercise a challenge on the basis of the race, gender, or ethnicity of the challenged juror."). It is neither unconstitutional nor uncommon for a prosecutor to use a peremptory challenge to remove a prospective juror after having unsuccessfully challenged the person for cause on the basis of his or her death penalty views. See Gray, 481 U.S. at 652 & 667-68. Cf. Ross v. Oklahoma, 487 U.S. 81, 85 (1988).

Petitioner has not provided factual or legal support for Claim R. Respondent has carried his burden in pointing to portions of the record that demonstrate the lack of a factual basis for the claim and has shown that petitioner's legal argument lacks merit. Accordingly, petitioner's motion for summary judgment should be denied, and respondent's motion should be granted on Claim R.

S. California Death Penalty Statutory Scheme

In this claim petitioner presents a sweeping constitutional challenge to the 1978 California Death Penalty Law both on its face and as applied to him at trial and on appeal. (Am. Pet. at 99-111.) Specifically petitioner alleges that: (1) the penalty phase jury instruction as to the consideration of aggravating and mitigating factors was unconstitutionally vague; (2) the penalty phase jury instruction as to Factor (b) aggravating factors was unconstitutional; (3) California law allowing the prosecution to relitigate the facts of his prior felony convictions as aggravating evidence is unconstitutional; (4) the penalty phase instructions improperly allowed the jury to double count his capital offense as an

aggravating factor under both Factor (a) and Factor (b); (5) to the extent the 1978 California Death Penalty law permits the jury not to be instructed that any aggravating factor relied upon must be established beyond a reasonable doubt it is unconstitutional; (6) it was constitutional error not to require the jury to designate the aggravating factors relied upon; (7) it was constitutional error not to require the jury to unanimously agree as to the aggravating factors relied upon; (8) the penalty phase instruction failed to adequately convey to the jury the meaning of "mitigation"; (9) to the extent the 1978 California Death Penalty law invests the power of sentencing to the District Attorney and fails to provide guidance in making the decision of whether to seek the death penalty it is unconstitutional; (10) to the extent the 1978 California Death Penalty law fails to give prisoners sentenced to death the same type of disparate sentence review afforded non-capitol felons it violates the Equal Protection Clause of the Constitution; (11) the California Supreme Court fails to provide fair and meaningful review in capital cases in violation of the Constitution; (12) California law provides no discernible, uniform standard by which a jury is to decide whether to impose the sentence of death; (13) the 1978 California Death Penalty law fails to narrow the class of offenders eligible for the death penalty; and (14) petitioner's death sentence predicated upon the triple use of the felony-murder doctrine was unconstitutional. (Id.)

Respondent has moved for summary judgment in its favor as to each aspect of this claim. In his cross-motion for summary

judgment petitioner seeks summary judgment in his favor while conceding that under precedent binding on this court he is not entitled to prevail as to several aspects of the claim. Below, the court will address each subpart of this claim and will summarize the arguments of the parties where necessary.

1. Jury Instruction Regarding Consideration of Aggravating and Mitigating Factors

In his opposition and cross-motion (Opp'n & Cross-Mot. for Summ. J. at 210) petitioner acknowledges that relief on this claim has been foreclosed by the United States Supreme Court's decision in Tuilaepa v. California, 512 U.S. 967, 978 (1994). See also Williams v. Calderon, 52 F.3d 1465, 1481-82 (9th Cir. 1995). Accordingly, respondent is entitled to summary judgment on this sub-claim.

2. Jury Instruction as to Factor (b) Aggravating Factors

Likewise, petitioner acknowledges that relief on this claim has also been foreclosed by the Supreme Court pursuant to Tuilaepa, 512 U.S. at 976-78. (Opp'n & Cross-Mot. for Summ. J. at 210.) Accordingly, respondent is entitled to summary judgment on this sub-claim as well.

3. Facts of Prior Felony Convictions as Aggravating Evidence

Petitioner concedes that the Ninth Circuit has previously rejected the argument presented by this claim in McDowell v. Calderon, 107 F.3d 1351, 1366 (9th Cir.), vacated in part on other grounds on reh'g en banc, 130 F.3d 833 (9th Cir. 1997), and that this court is bound by that decision. (Opp'n & Cross-Mot. for Summ. J. at

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210.) Accordingly, respondent is entitled to summary judgment on this sub-claim.

4. Consideration of Petitioner's Capital Offense as an Aggravating Factor Under Both Factor (a) and Factor (b)

Petitioner concedes that the Ninth Circuit has rejected this argument in Gerlaugh v. Stewart, 129 F.3d 1027, 1044 (9th Cir. 1997), and that this court is bound by that decision. (Opp'n & Cross-Mot. for Summ. J. at 211.) Accordingly, respondent is entitled to summary judgment on this sub-claim.

5. Aggravating Factors Relied Upon and Proof Beyond a Reasonable Doubt

In this claim petitioner alleges that, in accordance with California's 1978 Death Penalty Law, the jury was not instructed that any aggravating circumstance relied upon in imposing the death penalty had to be established beyond a reasonable doubt. Indeed, petitioner argues that the instructions failed to specify any burden of proof or persuasion in this regard. (Am. Pet at 101-02.) Respondent moves for summary judgment on this sub-claim, arguing that because a jury may be given complete discretion in determining the penalty once death-eligibility has been established (Tuilaepa, 512 U.S. at 979-80) claims regarding any burden of proof, written findings or unanimous agreements are precluded. Respondent also notes that since a burden of proof on a defendant of establishing mitigating circumstances by a preponderance of the evidence is not unconstitutional (Walton v. Arizona, 497 U.S. 639, 649-51 (1990)), no higher burden should be placed on the prosecution. Finally,

respondent generally argues that this aspect of California's 1978 Death Penalty Law has been found to be constitutional.

Petitioner counters that the question of whether federal law requires that all aggravating circumstances in a death penalty case be proven beyond a reasonable doubt is an open one. See Woratzeck v. Stewart, 97 F.3d 329, 335-36 (9th Cir. 1996). Petitioner also argues that neither of the Supreme Court decisions relied upon by respondent addresses the issue presented here.

Although the parties have submitted exhaustive briefing on many claims presented by petitioner, this sub-claim has not been adequately addressed. It appears that the question of whether the federal Constitution requires aggravating circumstances to be found beyond a reasonable doubt is an open one. Beaty v. Stewart, 303 F.3d 975, 986 (9th Cir. 2002) (citing Woratzeck, 97 F.3d at 335), cert. denied sub nom. Ryan v. Beaty, ___ U.S. ___, 123 S. Ct. 2073 (2003). Although respondent relies upon the decision in Walton v. Arizona, 497 U.S. 639 (1990), in that case the Supreme Court merely rejected a constitutional challenge to a death penalty that failed to require the state to prove both the appropriateness of a death sentence and the absence of mitigating circumstances beyond a reasonable doubt. 497 U.S. at 3054-56.

It may be that petitioner cannot prevail on this claim. See Tuilaepa, 512 U.S. at 979 (rejecting a challenge to the California death penalty law based upon the fact that the jury is provided no instruction on how to weigh any of the facts it finds in deciding the ultimate sentence); Williams v. Calderon, 48 F. Supp. 2d

979, 1030 (C.D. Cal. 1998), aff'd in part and vacated in part on other grounds, 306 F.3d 665 (9th Cir. 2002). (See also CT at 1531 (instruction informing the jury that it must find a sentence of death "appropriate" beyond a reasonable doubt).) However, based upon the arguments submitted to date neither party has established its entitlement to judgment in its favor as a matter of law on this sub-claim. Accordingly, the court will recommend that the cross-motions for summary judgment on sub-claim S-5 be denied.

6. Designation of the Aggravating Factors Relied Upon

Petitioner acknowledges that the Ninth Circuit has rejected an identical claim in Williams v. Calderon, 52 F.3d at 1484-85, and Harris v. Pulley, 692 F.2d at 1195-96, and that this court is bound by those decision. (Opp'n & Cross-Mot. for Summ. J. at 212.) Again, petitioner's concession is well-taken and respondent is entitled to summary judgment on this sub-claim.

7. No Requirement of Unanimous Agreement As to the Aggravating Factors Relied Upon

In this claim petitioner argues that the Constitution was violated when his jury was not required to agree unanimously on the existence and aggravating nature of any factor relied upon in returning a verdict of death. Summary judgment in favor of respondent should be granted with respect to this sub-claim. See Williams v. Calderon, 48 F. Supp. 2d at 1030 (granting summary judgment in favor of respondent on an identical claim); Turner v. Calderon, 970 F. Supp. 781, 792 (E.D. Cal. 1997), aff'd 281 F.3d 851 (9th Cir. 2002); Bonin v. Vasquez, 807 F. Supp. 589, 623 (C.D. Cal.

1992) ("The Court holds that the Constitution does not require jury unanimity on aggravating factors."), aff'd, 59 F.3d 815 (9th Cir. 1995).

8. Penalty Phase Instructions Adequately Conveyed the Meaning of Mitigation

In this claim petitioner argues that while his jury was instructed to consider and weigh mitigating factors, the instruction failed to adequately convey to the jury of laypersons the meaning of the concept of mitigation. (Am. Pet. at 102.) Respondent moves for summary judgment on this sub-claim, arguing that petitioner's jury was told that it could consider several specific mitigating factors and one general mitigating factor. Citing the United States Supreme Court's decision in Buchanan v. Angelone, 522 U.S. 269 (1998), respondent contends that there was no constitutional error in that the jury's consideration of mitigating factors was in no way limited. Petitioner counters with a detailed argument based upon a number of empirical studies allegedly suggesting that the catch-all mitigation instruction given to California jurors is actually misunderstood by a significant number of jurors.

Petitioner has not suggested that the jury was led to believe by the instructions given that it could not consider the mitigation evidence presented on his behalf. See Belmontes, 350 F.3d at 896-98. Here, the jury was instructed that it "shall" consider all of the evidence in determining which sentence to impose. (CT at 1527-31, 1534, 1537.) By so instructing the jury the trial court performed its duty of conveying to the jury that all mitigating

evidence must be considered in determining the appropriateness of a sentence of death. Buchanan, 522 U.S. at 276. Accordingly, respondent is entitled to summary judgment on this sub-claim.

9. The 1978 California Death Penalty Law and the Power of the District Attorney In Making the Charging Determination

Respondent moves for summary judgment on this sub-claim, arguing that the "issue is one of state government." (Alt. Mot. for Summ. J. at 174-75.) More to the point, respondent argues that the United States Supreme Court has confirmed broad prosecutorial discretion in seeking the death penalty. (Id. at 175 (citing McCleskey, 481 U.S. at 311-12, and Gregg v. Georgia, 428 U.S. 153, 199-200, 224-26 (1976)).) In response, petitioner submits this sub-claim on the allegations of the petition.[49]

The decision of whether or not to prosecute and what charge to bring generally rests entirely in the discretion of the prosecutor. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); Belmontes, 350 F.3d at 892. Nonetheless, "the decision to charge the death penalty cannot rest on criteria that offend the Constitution." Belmontes, 350 F.3d at 893. See also McCleskey, 481 U.S. at 293. Here, petitioner claims that the unfettered charging discretion of the District Attorney "results in imposition of the death penalty in an arbitrary and uncontrolled manner." (Am. Pet. at 103.) Such a

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[49] Petitioner notes that in Claim Q he has challenged the trial court's summary rejection of his claim that the death penalty was discriminatorily imposed on the basis of race and makes clear that he is not conceding that claim by submitting this sub-claim on the allegations of the petition.

claim has previously been rejected. See Belmontes, 350 F.3d at 896 (citing McCleskey, 481 U.S. at 306-12). Accordingly, respondent is entitled to summary judgment on this sub-claim.

10. The 1978 California Death Penalty Law and Equal Protection with Respect to Disparate Sentence Review

In sub-claim S-10 petitioner alleges that California's 1978 Death Penalty Law violates equal protection principles in that it fails to provide to those sentenced to death the same type of disparate sentence review afforded to non-capital felons. (Am. Pet. at 103.) Proportionality review within California's death penalty scheme is not constitutionally mandated. See Pulley v. Harris, 465 U.S. 37 (1984). Moreover, this same equal protection-based claim with respect to the denial of proportionality review to death sentences as opposed to non-capital offenses has previously been rejected. Williams, 48 F. Supp. 2d at 1030-31. Petitioner has presented no new arguments nor has he factually or legally developed the claim. Accordingly, respondent is entitled to summary judgment on this sub-claim.

11. The California Supreme Court and the Fair and Meaningful Review of Capital Cases

Here, petitioner alleges that the review of death judgments undertaken by the California Supreme Court is not the full, fair and good faith review contemplated by the United States Constitution. (Am. Pet. at 104-07.)

Respondent perfunctorily moves for summary judgment on this sub-claim, simply stating that "the state appeal process provides for

review for legal error." (Alt. Mot. for Summ. J. at 176.) Petitioner, on the other hand, argues in some detail that both statistics and specific examples establish that the California Supreme Court for years has failed to provide meaningful appellate review in death cases, rendering the death judgment in his case invalid. (Opp'n & Cross-Mot. for Summ. J. at 216-22.)

Such evidence aside, the court is not persuaded that the review that petitioner actually received on his automatic appeal was so deficient as to effectively deprive him of his automatic appeal rights. Petitioner's claim must be analyzed by assessing the appeal rights afforded in his specific case. See, e.g., Campbell v. Blodgett, 997 F.2d 512, 523 (9th Cir. 1992).[50] Here, the California Supreme Court considered extensive briefing on petitioner's direct appeal and in connection with his petitions for writ of habeas corpus. That court issued a lengthy published opinion addressing

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[50] In Campbell, the habeas petitioner argued that the Washington Supreme Court's failure to provide meaningful appellate review of his sentence deprived him of a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. 997 F.2d at 522. The appellate court found that relevant sections of the Washington Code created a liberty interest in having the state high court review and make particular findings before affirming petitioner's death sentence. Id. at 521-22. The court noted, however, that the review required under the cited statutes was not extensive, and that the review which was in fact afforded, as reflected in the Washington Supreme Court's opinion, was statutorily adequate. Id. at 522. Reasoning that "[t]he amount of ink expended in disposing of an issue bears no necessary correlation with the degree of care lavished upon it in reaching that conclusion," the court rejected petitioner's claim that the review was "so deficient" as to "effectively deprive[]" him of his right to review. Id. at 522-23. The court further noted that any alleged error "less egregious" than a wholesale refusal to afford him his right to review, would amount to a mere claim of error under state law, not cognizable in federal habeas corpus proceedings. Id. at 522.

both state law and constitutional claims with respect to the guilt and penalty phases of petitioner's trial. Petitioner's statistical and case-by-case analysis is insufficient to show that petitioner's own appellate rights were abrogated in such a "wholesale" fashion as to amount to a constitutional violation.

Accordingly, respondent is entitled to summary judgment on this sub-claim.

12. California Law and a Uniform Standard for the Jury's Death Penalty Determination

In this claim petitioner contends that California has no discernible, reasonably uniform standard by which a jury is to decide whether to impose a sentence of death because the California Supreme Court has failed to clearly and consistently articulate the role of the jury in making the sentencing determination. (Am. Pet. at 107-08.) The result, petitioner argues, is the arbitrary and unconstitutional imposition of the death penalty. (Id. at 110-11.) Respondent moves for summary judgment arguing that under Supreme Court precedent, "no standards are required." (Alt. Mot for Summ. J. at 176.) Petitioner responds by arguing that the Supreme Court has required that a jury's eligibility and selection decisions with respect to the death penalty "must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." (Opp'n & Cross-Mot. for Summ. J. at 223 (quoting Tuilaepa, 512 U.S. at 973)(emphasis added).)

Petitioner essentially claims that California juries are not provided sufficient guidance in reaching the death penalty

determination, thus allowing for arbitrary application of the death penalty. Such a claim has been rejected. Harris, 465 U.S. at 53. See also Williams, 48 F. Supp. 2d at 1023; Williams v. Vasquez, 817 F. Supp. 1443, 1471 (E.D. Cal. 1993), aff'd 52 F.3d 1465 (9th Cir. 1995).[51] Accordingly, respondent is entitled to summary judgment on this sub-claim.

13. Whether California Law Genuinely Narrows the Class of Death-Eligible Offenders

In this claim petitioner contends that his death sentence is invalid because the statutory scheme in California fails to narrow the class of offenders eligible for the death penalty in violation of the Eighth Amendment. (Am. Pet. at 108-110.)

Respondent moves for summary judgment in his favor, arguing that the Supreme Court has found that the California Death Penalty Law adequately narrows the class of death-eligible defendants. (Alt. Mot for Summ. J. at 177 (citing Harris, 465 U.S. at 53).) Relying on the decisions in Zant v. Stephens, 462 U.S. 862 (1983) and Lowenfield v. Phelps, 484 U.S. 231 (1988), respondent asserts that both a felony-murder special circumstance and a penalty factor that duplicates an eligibility factor adequately narrow the class of convicted murderers eligible for the death penalty.

Petitioner counters that the empirical evidence reflected in a study conducted by Professor Steven F. Shatz of the University

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[51] To the extent petitioner's sub-claim can be construed as arguing that the death penalty was arbitrarily imposed in his case, such a claim is also foreclosed. Belmontes,350 F.3d at 896 (citing McCleskey, 481 U.S. at 306-12).

of San Francisco School of Law proves that the death sentence ratios under the California scheme do not comply with the Eighth Amendment. (Opp'n & Cross-Mot. for Summ. J. at 223, 234-35). Petitioner argues that the California scheme is unconstitutional under Furman v. Georgia, 408 U.S. 238 (1972), in failing to genuinely narrow the class of death eligible defendants in light of the number and breadth of the special circumstances categories. (Opp'n & Cross-Mot. for Summ. J. at 224-36).

In Pulley v. Harris the Supreme Court reviewed the California death penalty scheme and stated:

> By requiring the jury to find at least one special circumstance beyond a reasonable doubt, the statute limits the death sentence to a small sub-class of capital-eligible cases. The statutory list of relevant factors, applied to defendants within this sub-class, "provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty," Harris v. Pulley, 692 F.2d, at 1194, "guarantee[ing] that the jury's discretion will be guided and its consideration deliberate," id., at 1195. The jury's "discretion is suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S., at 189, 96 S.Ct., at 2932. Its decision is reviewed by the trial judge and the State Supreme Court. On its face, this system, without any requirement or practice of comparative proportionality review, cannot be successfully challenged under Furman and our subsequent cases.

465 U.S. at 53. See also California v. Brown, 479 U.S. 538, 540 (1987); Williams v. Vasquez, 817 F. Supp. at 1471.

Petitioner argues that several justices concurring in and dissenting from the Court's decision in Tuilaepa v. California implicitly invited consideration of whether California's death

penalty scheme satisfied the constitutional narrowing requirement. See, e.g., 512 U.S. at 992-95 (Justice Blackmun, dissenting). Although it has been suggested that the Court would "be well advised to reevaluate its decision in Pulley v. Harris," id. at 995, the Court has not done so. The holding of the Supreme Court in Harris precludes the relief petitioner seeks. Accordingly, respondent is entitled to summary judgment on this sub-claim.

14. Petitioner's Death Sentence Predicated Upon the Use of the Felony-Murder Doctrine

Petitioner acknowledges that relief on this claim has been foreclosed by the Supreme Court's decision in Lowenfield, 484 U.S. at 241-46 (1988). (Opp'n & Cross-Mot. for Summ. J. at 236.) The concession is appropriate. See Tuilaepa, 512 U.S. at 976-78. Accordingly, respondent is entitled to summary judgment on this sub-claim.

T. Bias and Prejudice of Trial Jurors

In Claim T petitioner alleges that bias and prejudice on the part of jurors resulted in the violation of his rights under the Fifth, Sixth, Eighth and Fourteen Amendments to the United States

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Constitution.[52] Petitioner presents three sub-claims with respect to his allegation of juror bias.[53]

First, petitioner contends that juror Peinado failed to provide accurate answers on his juror questionnaire. Petitioner argues that juror Peinado did not disclose the following information called for by the questionnaire: (1) that his three sons had pled guilty in a case involving a 1985 shooting of two police officers and that one of the officers, Mike Lopez, was listed as a prospective witness at petitioner's trial; (2) that his son Joseph Peinado pled guilty to a 1981 robbery of a Kwik Stop Market; (3) that officer Lopez had filed a personal injury suit against his sons as a result of the 1985 shooting; (4) that Mr. Peinado knew people who used drugs and alcohol and believed that such people know what they are doing and should be held responsible for the crimes they commit; (5) that he believed that the fact that a person is subjected to abuse during childhood is not relevant in determining the person's guilt or the

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[52] Petitioner also alleges that he received ineffective assistance of counsel in that his trial attorneys failed to conduct a meaningful voir dire of the prospective jurors and failed to challenge certain jurors for cause or remove them through use of peremptory challenges. This aspect of petitioner's claim T has been addressed in Section C, supra.

[53] Petitioner has also presented a fourth sub-claim, asserting that juror Alvarado falsely declared under oath that neither he nor his spouse had ever been involved in a lawsuit (criminal or civil). (Am. Pet. at 122.) Juror Alvarado's wife had obtained a temporary restraining order preventing him from "'annoying, harassing, threatening or molesting [his wife] . . . .'" (Id.) Petitioner now states that he does not oppose respondent's motion for summary judgment in this regard. (Opp'n & Cross-Mot. for Summ. J. at 134-35.) Therefore, respondent's motion should be granted as to this sub-claim.

appropriate penalty; and (6) that he did not trust lawyers based on the experiences of his sons. (Am. Pet. at 113-15.) Petitioner contends that if this information had been disclosed, juror Peinado would have been excused for cause. (Id. at 115.)[54]

Second, petitioner claims that several jurors (including jurors Alvarado, Wight, and Long) were biased in favor of the death penalty. (Id.) Petitioner argues that if the views of these jurors had become during voir dire, they would have been excused for cause. (Id. at 116-17.)

Third, petitioner contends that during voir dire jurors were asked whether there was any information that had not been disclosed by their answers to the questions posed that in fairness should be disclosed. (Id. at 120.) One juror disclosed to the other jurors during penalty phase deliberations that he had killed someone in the line of duty. (Id. at 120-21.) Petitioner claims that if the juror had disclosed this information, it would have been grounds for a challenge for cause. (Id. at 121.) In this regard, petitioner claims that "[t]he fact that the juror had killed someone in a manner in which the juror believed was justified rendered him unable to be impartial in a case where the killing was not justified." (Id.)

Below, the court will first address the legal standards applicable to this claim and will then summarize and address the

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[54] Petitioner argues that bias should be presumed because the crimes committed by juror Peinado's sons are closely connected to the crimes for which petitioner was tried. (Id. at 116.)

arguments of the parties with respect to each of petitioner's sub-claims.

1. Legal Standards Governing Claims of Juror Bias

The Sixth Amendment right to a jury trial "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). See also Ross v. Oklahoma, 487 U.S. at 85 (1988); Green v. White, 232 F.3d 671, 676 (9th Cir. 2000). Due process requires that the defendant be tried by "a jury capable and willing to decide the case solely on the evidence before it." Smith v. Phillips, 455 U.S. 209, 217 (1982). See also United States v. Plache, 913 F.2d 1375, 1377-78 (9th Cir. 1990).

Jurors are objectionable if they have formed such deep and strong impressions that they will not listen to testimony with an open mind. Irvin, 366 U.S. at 722 n.3. A defendant is denied the right to an impartial jury if even one juror is biased or prejudiced. Fields v. Woodford, 309 F.3d 1095, 1103 (9th Cir.), amended 315 F.3d 1062 (9th Cir. 2002); Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998) (en banc). Thus, "[t]he presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." United States v. Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000) (quoting Dyer, 151 F.3d at 973 n.2).[55]

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[55] Challenges for cause are the means by which biased jurors should be eliminated. United States v. Gonzalez, 214 F.3d at 1111. "A prospective juror must be removed for cause if his views would prevent or substantially impair the performance of his duties as a juror." Fields v. Woodford, 309 F.3d 1095, 1103 (9th Cir.), amended 315 F.3d 1062 (9th Cir. 2002).

Courts have analyzed juror bias under two theories, actual bias and implied (or presumed) bias, either of which may support a challenge of a prospective juror for cause. Fields, 309 F.3d at 1103 (citing Gonzalez, 214 F.3d at 1111). Actual bias is "'bias in fact' - the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." Gonzalez, 214 F.3d at 1112 (quoting United States v. Torres, 128 F.3d 38, 43 (2d Cir. 1997)). A trial judge's conclusion, after a hearing, that a juror does or does not harbor "actual bias" is a finding of fact to which the presumption of correctness applies. Dyer, 151 F.3d at 973. This is because such a decision "depends heavily on the trial court's superior ability to appraise witness credibility and demeanor." Thompson v. Keohane, 516 U.S. 99, 99-100 (1995). See also Wainwright, 469 U.S. at 428 ("[T]he question whether a venireman is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind . . . such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province.").

"Although actual bias is the more common grounds for excusing jurors for cause, '[i]n extraordinary cases, courts may presume bias based upon the circumstances.'" Gonzalez, 214 F.3d at 1112 (quoting Dyer, 151 F.3d at 981). See also McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556-57 (1984) (Blackmun, Stevens and O'Connor, JJ., concurring) (accepting that "in exceptional circumstances, that the facts are such that bias is to

inferred"); id. at 558 (Brennan and Marshall, JJ., concurring in the judgment) (agreeing that "[t]he bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as [a] matter of law") (alterations in original) (quotations omitted); Smith, 455 U.S. at 221-24 (O'Connor, J, concurring) ("there are some extreme circumstances situations that would justify a finding of implied bias"). Thus, the Ninth Circuit has presumed bias from "the 'potential for substantial emotional involvement, adversely affecting impartiality,' inherent in certain relationships." Tinsley v. Borg, 895 F.2d 520, 527 (9th Cir. 1990) (quoting United States v. Allsup, 566 F.2d 68, 71 (9th Cir. 1977)). See also Green, 232 F.3d at 676; Gonzalez, 214 F.3d at 1112-14; Dyer, 151 F.3d at 981-82; Eubanks, 591 F.2d at 517.

In McDonough Power Equip., Inc. v. Greenwood, the Supreme Court explained the importance of voir dire in obtaining a panel of impartial jurors.

> *Voir dire* examination serves to protect that right [right to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.

464 U.S. at 554. See also Fields, 309 F.3d at 1103. Thus, a juror "who lies materially and repeatedly in response to legitimate inquiries about her background introduces destructive uncertainties into the process." Dyer, 151 F.3d at 983. Accordingly, while many

irregularities during voir dire are immaterial to the fairness of a trial, a juror who lies in order to secure a seat on a jury may be found to be presumptively biased. Green, 232 F.3d at 677-78; Dyer, 151 F.3d at 984.

Against these standards the court will consider each of petitioner's three sub-claims.

2. Juror Peinado

As noted above, petitioner alleges that juror Santos Peinado failed to provide accurate information on his juror questionnaire compelling the conclusion that he was biased. In this regard petitioner alleges that: (1) although Mr. Peinado had three sons (Santos Peinado, Jr., Joseph Louis Peinado, and Joseph Rudy Peinado) he provided no response on the jury questionnaire when asked if he had any children and if so to list their sex, age, education level, and occupation; (2) juror Peinado affirmatively answered "no" to questions regarding whether he, his spouse, a relative or close friend had ever been witness to or been accused or convicted of a crime even though his three sons had pled guilty to charges involving the shooting of two police officers resulting in a five year prison sentence for Santos, Jr., a three year sentence for Joseph Rudy, and a one year county jail term for Joseph Louis and even though one of his sons was charged in 1981 with the robbery of a Kwik Stop Market; (3) Mr. Peinado affirmatively answered "no" to the question inquiring whether he, his spouse, a relative or close friend had ever been interested in or involved in any criminal or civil lawsuit even though his sons were sued by police officer Mike Lopez for injuries

suffered in the 1985 shooting incident; (4) juror Peinado responded "no" to questions regarding whether he knew any judge, lawyer or any person who works for a district attorney's or a public defender's office even though he knew lawyers as a result of his sons' criminal cases and as a result did not trust attorneys; (5) Mr. Peinado responded "no" when asked whether he knew anyone who has had a problem with alcohol or drugs when in fact he knew people who used drugs and alcohol and believed such people know what they are doing and should be held responsible for crimes committed while under the influence; and (6) juror Peinado failed to disclose his belief that a person's difficult childhood and any abuse they may have suffered as a child is not relevant to their responsibility for crimes committed as an adult. (Am. Pet. at 112-115.)

In support of these allegations petitioner relies primarily upon the 1995 declaration of juror Peinado submitted originally in support of petitioner's state habeas petition. (Am. Pet., Ex. G; Opp'n & Cross-Mot. for Summ. J., Ex. CC.) In that declaration, executed approximately eight years after petitioner's trial, juror Peinado stated that he: (1) "used to have a lot of trouble understanding the English language;" (2)"did not understand the question 'Have you or your spouse, a relative, a close friend, or an acquaintance ever been accused or convicted of a crime?'" and because his sons had gone to prison for certain crimes, he would have told the truth if the question had been explained to him; (3) never told the judge or any attorneys about his sons' criminal records but had he been asked about his children he would have divulged the

information; (4) knew police officer Mike Lopez who came to his house after his sons were arrested and was concerned when his son Santos, Jr. got out of prison because Officer Lopez harassed him; (5) doesn't "trust lawyers very much" because when his sons were in trouble a lawyer told him that for ten thousand dollars he would guarantee that his sons would go free and believed that if his sons had better lawyers they would not have gone to prison; (6) and his wife were very concerned for their sons' safety while the boys were in prison; (7) felt "very strongly that drugs and alcohol are not an excuse for committing crimes" and that from his "own experience, knowing people who use drugs or alcohol, I believe that people know exactly what they're doing when they take drugs or alcohol and should be responsible for any crimes they commit;" and (8) felt "that a person's bad childhood does not excuse any crimes he commits," that "parents can no longer be held responsible for what the child does" and that if any evidence was presented showing that the defendant's father did bad things to his children it would not have made a difference to him in deciding whether the defendant should get the death penalty. (Id. at 1-4.)

In moving for summary judgment respondent argues in conclusory fashion that Mr. Peinado was not dishonest in his responses but rather simply did not understand the questions asked in the juror questionnaire and during voir dire. (Alt. Mot. for Summ. J. at 191.) Respondent also argues that bias should not be presumed or implied because there is little similarity between petitioner's

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case and the criminal cases involving Mr. Peinado's sons. (Id. at 191-92.)

Petitioner argues that juror Peinado's failure to disclose this information shows his lack of impartiality and a predisposition in favor of the death penalty. (Opp'n & Cross-Mot. for Summ. J. at 143.) Petitioner also argues that the fact that juror Peinado's sons had criminal convictions gave juror Peinado "a strong bias and motive to reject out of hand a key component of petitioner's penalty-phase case, which was to mitigate punishment on the basis of the shortcomings of petitioner's father." (Id. at 144.)

The jury questionnaire specifically asked if the prospective juror had any children. (Am. Pet., Ex. F at 3; Opp'n & Cross-Mot. for Summ. J., Ex. Z at 3.) Juror Peinado did not answer the question. (Id.) Prospective jurors were also asked whether they, their spouse, a relative, a close friend, or an acquaintance had been accused or convicted of a crime. Juror Peinado explicitly answered this question "no." (Id. at 5.) In his post-trial declaration juror Peinado's states only that he didn't understand the latter question and that if "anyone had asked me about my children, I would have told them." (Am. Pet., Ex. G at 2; Opp'n & Cross-Mot. for Summ. J., Ex. CC at 2.) That explanation would appear at least potentially inconsistent with juror Peinado's failure to answer the very specific question seeking to determine whether he had any children.

In addition, Mr. Peinado specifically stated on his juror questionnaire that he did not know any lawyers or any person who

worked in a public defender's office. (Am. Pet., Ex. F at 8; Opp'n & Cross-Mot. for Summ. J., Ex. Z at 8.) However, his post-trial declaration establishes that he had met with at least one defense attorney in connection with the prosecution of his sons and that the experience was not a good one. (Am. Pet., Ex. G at 3-4; Pet'r's Opp'n & Cross-Mot. for Summ. J., Ex. CC at 3-4.) As a result, Mr. Peinado did not "trust lawyers very much and believed that if his sons had had better lawyers they would not have gone to prison." (Id.) Likewise, on his jury questionnaire juror Peinado specifically denied knowing any person who has or had a problem with drugs or alcohol. (Am. Pet., Ex. F at 10; Opp'n & Cross-Mot. for Summ. J., Ex. Z at 10.) However, his post-trial declaration indicates that he not only knew people with drug or alcohol problems but from that experience harbored strong feeling that such individuals know what they are doing and should be held responsible for their crimes. (Am. Pet., Ex. G at 3; Opp'n & Cross-Mot. for Summ. J., Ex. CC at 3.) Those inconsistent responses cannot be reconciled on the basis of the present record.

Summary judgment should not be granted for either party on this sub-claim alleging bias on the part of juror Peinado. Further development of the facts will be needed to determine whether juror Peinado was intentionally misleading and/or biased. Dyer, 151 F.3d at 974 ("[a] court confronted with a colorable claim of juror bias must undertake an investigation of the relevant facts and circumstances.") Thus, an evidentiary hearing is likely necessary to resolve this aspect of Claim T. See Williams v. Taylor, 529 U.S.

420, 441 (2000) (evidentiary hearing to determine partiality required where one of juror's responses to voir dire question was not forthcoming and another was factually misleading); Fields, 309 F.3d at 1105-06 (evidentiary hearing appropriate where it was unclear whether juror intentionally concealed information or gave a misleading response to voir dire question regarding his background); see also Smith, 455 U.S. at 215.[56]

3. Jurors Alvarado, Wight, and Long[57]

As noted above, petitioner claims that several jurors were biased in favor of the death penalty and that if the views of these jurors had become known during voir dire, they would have been excused for cause. (Am. Pet. at 116-17.) Petitioner relies in part on the post-trial declarations of jurors Wight and Long in support of

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[56] Petitioner also argues that because juror Peinado did not disclose information about his sons' criminal history, defense counsel did not have the opportunity to discover Mr. Peinado's "strong bias and motive to reject out of hand a key component of petitioner's penalty-phase case, which was to mitigate punishment on the basis of the shortcomings of petitioner's father." (Opp'n & Cross-Mot. for Summ. J. at 144.) Finally, petitioner claims that juror Peinado falsely answered the jury questionnaire inquiry of whether he, his spouse, a relative or a close friend had ever been interested in or involved in any civil or criminal lawsuit (Am. Pet., Ex. F at 5; Opp'n & Cross-Mot. for Summ. J., Ex. Z at 5) given the fact that his sons had been criminally prosecuted and Officer Lopez had filed a civil suit against them stemming from that same incident. These matters can be fully explored at the anticipated evidentiary hearing.

[57] Petitioner claims: "Several jurors, including, but not limited to, Alvarado, Wight, and Long, were biased due to their views about the death penalty which prevented those jurors from rendering a reliable, impartial, individualized, and fair penalty determination." (Am. Pet. at 116.) However, petitioner has only presented arguments regarding jurors Alvarado, Wight, and Long. Therefore, the court will consider his claim only with respect to these three jurors.

this sub-claim. (Am. Pet., Exs. K & L; Opp'n & Cross-Mot. for Summ. J., Exs. S & X.) In her declaration, Ms. Wight acknowledged that after she determined petitioner's guilt, she never considered a sentence of life without parole. (Am. Pet., Ex. L at 2; Opp'n & Cross-Mot. for Summ. J., Ex. S at 2.) However, Ms. Wight also stated that the jurors carefully weighed the aggravating and mitigating factors in reaching their penalty phase verdict. (Id.) In her declaration, Ms. Long indicated that she "reviewed some of the evidence presented at the guilt phase . . . to confirm the conclusions [she] had *tentatively* reached from listening to the evidence presented during the trial." (Am. Pet., Ex. K at 1; Opp'n & Cross-Mot. for Summ. J., Ex. X at 1.)

In moving for summary judgment respondent argues that the personal belief of some jurors that the death penalty should be imposed for intentional murders is not remarkable and that the only relevant inquiry is whether prospective jurors would consider all evidence, including mitigating evidence, in reaching their verdict. (Alt. Mot. for Summ. J. at 180.) Respondent points out that during voir dire: juror Alvarado indicated that he would be able to vote for the death penalty or life imprisonment without the possibility of parole (RT at 2080); juror Wight expressed her strongly support for the death penalty but indicated that she remained open to the possibility of imposing a life sentence without the possibility of parole (id. at 3390-91, 3400, 3407); and juror Long stated that while she felt the death penalty was a necessary thing "when called for,"

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she was open to considering life without the possibility of parole for an intentional murder (id. at 3717, 3719-20).

In opposing respondent's summary judgment motion, petitioner contends that the ultimate question is whether a juror's view about the death penalty would prevent or substantially impair the juror from performing his or her duty, including consideration of mitigating evidence. (Opp'n & Cross-Mot. for Summ. J. at 149.) Petitioner argues that the three jurors in question did not "meaningfully consider any punishment less than death, once they determined at the guilt phase that the murder was intentional." (Id.)

As noted above in addressing petitioner's Claim P regarding the exclusion of jurors for cause, "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright, 469 U.S. at 420 (quoting Adams, 448 U.S. at 45). Petitioner has failed to make such a showing here. Even considering the post-trial declarations of the jurors describing their mental processes and the jury's deliberations (see Fed. R. Evid. 606(b)), the evidence submitted indicates that the three jurors in question were not substantially impaired in the performance of their duties as a result of their views and that they kept an open mind until the case was submitted to them for decision.

In this regard, Juror Abelardo Alvarado was initially questioned on the morning of November 7, 1986, in a group of three prospective jurors. (RT at 2068.) The defense did not question Mr.

Alvarado. However, the following exchange took place between juror Alvarado and the prosecutor:

> Q [Mr. Druliner]: Are you satisfied that if you were selected as a juror, if we got to the penalty phase, that you would be able to listen to all the evidence, and if you felt it appropriate based on the evidence and the guidelines from the Court that you would be able to render a verdict, a finding, if it was your opinion that the defendant deserved the death penalty, that you would be able to so vote?
>
> A [Mr. Alvarado]: I will assume that responsibility, yes.
>
> Q: And, likewise, if you felt the appropriate sentence was life without possibility of parole, would you be able to vote that way?
>
> A: Yes.

(Id. at 2080.) Mr. Alvarado's responses did not demonstrate that he would be substantially impaired or unable to perform his duties as a juror.

Juror Wight was initially questioned on the morning of November 19, 1986, in a group of four prospective jurors. (RT at 3333.) In response to defense counsel's questions, Ms. Wight stated that she thought the death penalty was appropriate where there was a premeditated murder, even though such a belief was contrary to that held by her church. (Id. at 3392, 3394.)

> Q [Defense Counsel]: Now the question, bottom line question really I want to ask you is that do you feel so strongly about that that it really wouldn't matter what other evidence was presented to you, it wouldn't matter he had a prior record, it wouldn't matter about some factor in mitigation; is that an accurate - -
>
> A [Ms. Wight]: Yes

(Id. at 3395.) However, Ms. Wight later responded that she would consider mitigating factors.

> Q [Defense Counsel]: - - some more evidence may be, some evidence to show you that Mr. Breaux is even worse than the crime that he was convicted of or there may be some evidence to show you he has some redeeming quality, and my question is do you have feelings so strongly about your view that in the case of a premeditated first degree murder you feel so strongly that you really wouldn't consider the other information about his background?
>
> A [Ms. Wight]: No.
>
> Q: Pardon me?
>
> A: No.
>
> . . . .
>
> Q: Okay. A minute ago, you told me that, in the case of premeditated murder, you felt that the death penalty was appropriate.
> And then you said that it would depend on, maybe, his background and that sort of thing.
> Can you explain your view on that?
>
> A: Well, no.
> I - - I - - I- - I - - I - - I believe in the death penalty.
> But I think that sometimes when you hear things about a person, or - - or that you may change - - change your mind.
> I don't - - I don't know.
> I have never been in this position. So . . .

(Id. at 3396, 3398.)

Later, Ms. Wight twice indicated that she would take into consideration a person's "background" in deciding whether the appropriate penalty was death or life in prison without the possibility of parole. (Id. at 3399-3400.) Outside Ms. Wight's presence, defense counsel challenged her for cause because she was

according to his description "an automatic death penalty proponent under the law[.]" (Id. at 3404.) The trial court denied the challenge and indicated that neither Ms. Wight's demeanor nor credibility provided cause to believe that she would be substantially impaired. (Id. at 3408.) This court finds that the record supports the trial court's decision not to excuse Ms. Wight for cause. United States v. Long, 301 F.3d 1095, 1101 (9th Cir. 2002) (The trial court "has the discretion to determine whether jurors are telling the truth, whether they can proceed fairly, and whether they should be excused or replaced."), cert. denied, 537 U.S. 1216 (2003); see also Bashor v. Risley, 730 F.2d at 1237. Ms. Wight voiced her belief that the death penalty was appropriate for premeditated murder, she also repeatedly stated that she would consider a person's background and mitigating factors in deciding on the appropriate penalty.

Juror Gloria Long was initially questioned during the afternoon session on November 20, 1986, with a group of four prospective jurors. (RT at 3683.) She was specifically asked by defense counsel about her views on the death penalty. Ms. Long responded: "I believe the death penalty, when it's called for, is a necessary thing." (RT at 3717.) Ms. Long explained that her views were not based on "religious feelings", but on her belief that since the death penalty was approved by the citizens of California, it was an appropriate "retribution" for a person who had killed with "no proven reason." (Id. at 3718-20.) Ms. Long was questioned about her willingness to consider both the death penalty and life imprisonment without the possibility of parole following a guilt phase verdict.

Q [Mr. Fathy]: Did you understand that means before you ever even consider the appropriateness of death or life in prison - -

A: (Nodding in the affirmative.)

Q: - - without possibility of parole, you will have concluded there has been an intentional killing - -

A: Yes.

Q: - - for no legally excusable reason?

A: (Nodding in the affirmative.)

Q. Since you do understand that, let me ask you whether or not, given the view you just expressed - -

A: (Nodding in the affirmative)

Q: - - about - - about retribution - -

A: Un -huh. (In the affirmative.)

Q: - - whether you would be open, truly open to imposing some punishment other than death?
And in this case the other alternative is life in prison without possibility of parole.

A: I definitely would. I mean I - - I'm not saying that I'm out to get rid of everybody that has done something wrong. I don't believe that.
But I do think there are instances where - - where it is appropriate.
That's all I was trying to say.
But, yes, I would have no problem.

Q: You'd be willing to listen to whatever evidence - -

A: (Nodding in the affirmative.)

Q: - - the defense wanted to present and what is admissible under our system of law - -

A: (Nodding in the affirmative.)

(RT at 3720-21.)

When Ms. Long expressed some confusion about whether a person sentenced to life imprisonment without the possibility of parole could still be paroled, the trial court clarified that for crimes committed after 1977, such a sentence actually precluded the possibility of parole. (RT at 3722.) Ms. Long then responded that she did not have further concerns given the judge's clarification. (RT at 3723.)

Petitioner relies on Ms. Long's post-trial declaration in arguing that she was unwilling to consider mitigating factors once she concluded that petitioner had intentionally committed the murder. (Am. Pet., Ex. K; Opp'n to Mot. for Summ. J. & Cross-Mot. for Summ. J., Ex. X.) Even if that declaration is considered even though it describes Ms. Long's mental processes during deliberations (see Fed. R. Evid. 606(b)), the court finds that petitioner has failed to demonstrate that Ms. Long's views regarding the death penalty substantially impaired her ability to perform her duties as an impartial juror. Juror Long stated in that post-trial declaration that she and the other jurors took the penalty phase verdict decision very seriously and that during those deliberations she reviewed penalty phase evidence to confirm the conclusions she had tentatively reached. (Am. Pet., Ex. K at 1-2; Opp'n to Mot. for Summ. J. & Cross-Mot. for Summ. J., Ex. X at 1-2.)

4. Unidentified Juror Who Killed in the Line of Duty

Finally, petitioner alleges that one of the jurors commented to the others during penalty phase deliberations that he had killed someone in the line of duty, that it was something he had

to do and would do again and that, unlike petitioner, he felt remorse. (Am. Pet. at 120-21.) Petitioner relies on upon the post-trial declarations of two jurors to support this allegation. (Am. Pet., Exs. M at 5, O at 3; Opp'n to Mot. for Summ. J. & Cross-Mot. for Summ. J., Ex. O at 5; P at 3.) Petitioner claims that had that juror disclosed this information in voir dire it would have provided grounds to exclude the juror for cause based on bias. (Id.) Petitioner points out that all prospective jurors were asked whether there was any information not elicited by the jury questionnaire that in fairness should be disclosed and that this information was not disclosed. (Am. Pet. at 120.)

Respondent argues that the post-trial declarations from two jurors submitted in support of this allegation by petitioner are inadmissible because they do not reflect any extraneous influence on the jury. (Alt. Mot. for Summ. J. at 182.) Respondent also argues that a reasonable juror would conclude that the disclosure of such information was not required by any question put to prospective jurors either in the questionnaire or during voir dire. (Id. at 183.) Respondent asserts that even if the juror declarations are considered, this juror's apparent personal experience was not so closely related to the litigation at issue to create a presumption of juror bias since petitioner's case did not involve a defense that the homicide was justifiable or excusable. (Id.) Lastly, respondent argues that the past personal experiences of jurors are properly part of the jury's deliberation, and that this juror's remorse over having

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taken a life is a normal feeling that most people would have in that situation. (Id. at 184.)

Petitioner argues that juror who did not disclose that he had killed someone on the job was intentionally dishonest. (Opp'n & Cross-Mot. for Summ. J. at 137.) In this regard, petitioner notes that the jury questionnaire had asked:

> (1) whether they [jurors] "had ever been the victim of a crime,"
> (2) whether they had "ever been the witness to a crime,"
> (3) whether they had "ever given a statement . . . to law enforcement officers," and
> (4) whether there [was] any "information about yourself, not covered by the questionnaire, that in fairness should be known."

(Id. at 135.) Petitioner argues that all of these questions should have compelled the juror to disclose his experience. Since a person does not normally forget such a dramatic experience, petitioner asserts that the juror's non-disclosure demonstrates his dishonesty. (Id. at 137-38.) Lastly, petitioner argues that although jurors may rely on past personal experiences in their deliberations, they may not rely on such experiences relating to issues involved in the litigation. (Id. at 139.)

Petitioner also asserts that respondent's argument that the juror's killing could have occurred during combat or military service is unreasonable. (Pet'r's Reply at 35.) In this regard, petitioner points to a declaration of juror Sharon Lee, formerly Sharon McBride, in which she states that she was the jury foreperson and recalls the following:

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> In the January 1995 declaration, I stated that during the penalty deliberations, one male juror stated that he had killed someone once, that the killing was job related, and that he felt it was something he had to do. I did not recall the juror's name, but I did remember that he acted in a very authoritative manner. I still do not remember his name today, but I do still recall his discussion of the killing he had done. He said that the shooting happened when he was chasing a person on a train and that he had had to shoot the person.

(Pet'r's Reply, Ex. DDD ¶ 2.)

Even considering the post-trial declarations of the jurors describing the comments of this juror (see Fed. R. Evid. 606(b)), the evidence submitted fails to make even a preliminary showing of bias on the part of the juror in question. The court finds that, contrary to petitioner's allegation, the unnamed juror was not dishonest in his answer to any question put to him during the voir dire process. He was not asked a question that could be fairly said to have called for him to disclose this apparent experience from his past. The general request to disclose anything that in fairness that should be disclosed is far too vague to pin a claim of juror dishonesty upon. Accordingly, petitioner's allegations and evidence presented in support thereof fail to entitle him to relief. See McDonough Power Equipment, Inc., 464 U.S. at 555-56.

Moreover, it is well-established that a juror may rely on their past experiences in reaching a decision and that in doing so they are not improperly considering extrinsic evidence. Price, 200 F.3d at 1255; Hard v. Burlington Northern Railroad, 812 F.2d 482, 486 (9th Cir. 1987). All petitioner has pointed to is that while

discussing petitioner's lack of emotion at trial the unnamed juror commented to the other jurors that, unlike petitioner, he felt remorse for having taken a life. As previously noted, a defendant's courtroom demeanor is evidence that a jury may properly consider. Williams, 52 F.3d at 1483; Schuler, 813 F.2d at 981 n.3; see also Bates, 308 F.3d at 421.

Finally, the court is persuaded that even if this juror had such an experience in his past, the fact that a juror's job-related actions resulted in the death of another person bears little similarity to the facts of petitioner's case. Accordingly, the unnamed juror did not present the "potential for substantial emotional involvement" that would inherently adversely affect impartiality. Price, 200 F.3d at 1255, n.18 (quoting Tinsley, 895 F.2d at 527). Under these circumstances bias has not been demonstrated, nor should it be presumed. Price, 200 F.3d at 1255, n.18. Accordingly, respondent is entitled to summary judgment in his favor on this sub-claim.

5. Conclusion

The court will recommend that respondent's motion for summary judgment be denied with respect to the sub-claim involving juror Peinado and granted with respect to the sub-claims involving jurors Alvarado, Wight, Long and the unnamed juror. The court will also recommend that petitioner's cross-motion for summary judgment in his favor on claim T be denied.

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U. Incompetence of Trial Juror

In this claim petitioner argues that juror Peinado "was incompetent due to his significant intellectual disability and his failure to possess sufficient knowledge of the English language . . . ." (Am. Pet. at 123, 126.) Accordingly, petitioner alleges, juror Peinado's service on the jury resulted in the violation of petitioner's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (Id. at 123-24.) In support of this claim petitioner points to juror Peinado's lack of formal English training, his inappropriate or incomprehensible responses on his juror questionnaire, his inability to comprehend the judge's instructions or to deliberate effectively with the other jurors, and his lack of present memory about being a juror in a murder trial which resulted in a death sentence. (Id. at 126.)[58]

In moving for summary judgment on this claim respondent restates his arguments concerning the admissibility of juror declarations and, in the alternative, argues that juror Peinado was qualified to be a juror. (Alt. Mot. for Summ. J. at 82-84, 187.) As to competency, respondent contends that juror Peinado responded appropriately to the prosecutor's questions during voir dire, and that the court and counsel had the opportunity to observe juror Peinado's demeanor and how he responded to the questions. (Id. at

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[58] Petitioner also argues that the trial judge and defense counsel failed to adequately question juror Peinado during voir dire to ensure that he was competent to discharge his duties as a juror. (Am. Pet. at 126-28.) This claim has been addressed in section C, supra.

187-88.) Respondent also notes that at the time of trial, juror Peinado had lived in the United States for thirty-two years and that for eighteen years at his job he conversed in English with his boss. (Id. at 188.) Mr. Peinado's juror questionnaire indicates that he reads and understands English, although his handwriting and spelling are poor. (Id. at 189.) As for juror Peinado's competence based on his lack of recall, respondent argues that it is Mr. Peinado's memory at the time of the trial that is relevant, not his memory as reflected in his 1995 declaration submitted by petitioner in support of this claim. (Id. at 190.)

In response petitioner argues that Federal Rule of Evidence 606(b) does not bar consideration of the declarations submitted in support of this claim. (Opp'n & Cross-Mot. for Summ. J. at 141.) Petitioner contends that the evidence is part of the state court record, that respondent agreed to the admissibility of this evidence in state court, and that Rule 606(b) does not prohibit consideration of juror statements during voir dire or of statements used to show deceit during voir dire.[59] (Id.)

Petitioner argues that if juror Peinado's responses to the voir dire questionnaire were not intentionally dishonest, then they reflect his incompetence to serve as a juror because of his lack of comprehension of the English language. (Id. at 144.) According to petitioner, juror Peinado failed to accurately answer the

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[59] Whether Mr. Peinado's responses during the voir dire were deceitful has been addressed by the court in its discussion of Claim T, supra.

questionnaire when he: (1) denied that he, his spouse, a relative, a close friend, or an acquaintance had ever been accused or convicted of a crime; (2) denied that he, his spouse, a relative, a close friend, or an acquaintance had been interested in or involved in any type of criminal or civil lawsuit; (3) stated that he was from Reno, Nevada; (4) denied that he knew any lawyers; (5) denied that he knew any person who work for a district attorney's or a public defender's office; and (6) denied that he knew any person who has had a problem with alcohol or drugs. (Am. Pet., Ex. F; Opp'n & Cross-Mot. for Summ. J., Ex. Z.)

Contrary to these responses reflected on his questionnaire, petitioner contends that in his post-trial declaration juror Peinado acknowledged that in fact his sons had suffered criminal convictions and were involved in a civil lawsuit, he was born in Mexico, he knew lawyers, and he knew people who had an alcohol or drug problem. (Opp'n & Cross-Mot. for Summ. J. at 140-41, 147; see also Am. Pet., Ex. G; Opp'n & Cross-Mot. for Summ. J., Ex. CC.)

Petitioner also argues that juror Peinado has admitted to having difficulty with English. (Opp'n & Cross-Mot. for Summ. J. at 145.) In his declaration, juror Peinado acknowledges "having some trouble understanding what was being said by the judge, the lawyers and the witnesses at the trials for which I was a juror." (Am. Pet., Ex. G at 2; Opp'n & Cross-Mot. for Summ. J., Ex. CC at 2.) According to petitioner, juror Peinado left thirty questions entirely or partially blank and in his 1995 declaration he admitted, "I often left the answers blank or guessed at what the right answer was."

(Id. at 1.) Petitioner contends that during voir dire questioning, juror Peinado gave brief responses and thirteen times merely nodded his head and later admitted that he would do so if he did not understand what was being asked. (Id.) Petitioner also submits a declaration from Salvador Bernal who worked with Mr. Peinado, stating that juror Peinado's English was very limited at the time of petitioner's trial. (Opp'n & Cross-Mot. for Summ. J., Ex. MM.)[60] Petitioner argues that this evidence demonstrates that juror Peinado should not have served on the jury due to his limited comprehension of the English language. (Opp'n & Cross-Mot. for Summ. J. at 147-48.)

The court must first determine the extent to which Mr. Peinado's declaration may be considered to support this claim. Statements by jurors have traditionally been inadmissible to impeach the verdict. Tanner, 483 U.S. at 115. The exception is with respect

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[60] Salvador Bernal states:

> I remember that about 10 or 15 years ago, Santos [Peinado] told me and other workers that he was serving on a jury in a death penalty case. At the time, Santos' English comprehension and speaking were very poor, and I found it quite amusing that he would be serving on a jury. In fact, there were ongoing jokes among the workers about Santos being on the jury, although no one ever said anything about it when Santos was nearby. At the time, Santos had learned the very limited English needed to do his job, but I do not believe that he understood enough to be on a jury. I know that when I really wanted Santos to understand me, I always spoke to him in Spanish. Otherwise, he did not seem to get it.

(Opp'n & Cross-Mot. for Summ. J., Ex. MM at ¶ 2.)

to statements alleging that a jury has been subject to extraneous influence. Id. at 118. Federal Rule of Evidence 606(b) incorporates that common law rule and limits the court's ability to consider a juror's statements to impeach a verdict. As discussed above with respect to claims D and T, under Federal Rule of Evidence 606(b), the admissibility of juror Peinado's declaration thus turns on whether the declaration concerns matters external or internal to the jury process. Hard v. Burlington Northern Railroad, 870 F.2d 1454, 1460 (9th Cir. 1989). Statements regarding matters that are internal to the jury process are not admissible under Rule 606(b). United States v. Pimental, 654 F.2d 538, 542 (9th Cir. 1981). The Supreme Court has noted that "[c]ourts wisely have treated allegations of a juror's inability to hear or comprehend at trial as an internal matter." Tanner, 483 U.S. at 117-18. See also Virgin Islands v. Nicholas, 759 F.2d 1073, 1074-75 (3d Cir. 1985 (ability to hear or comprehend is internal to the jury process); United States v. Dioguardi, 492 F.2d 70, 78-80 (2d Cir. 1974) (physical competency of a juror considered internal).

In his post trial declaration juror Peinado addresses his comprehension of the English language, his memory, and his decision-making process. (Am. Pet., Ex. G; Opp'n & Cross-Mot. for Summ. J., Ex. CC.) These subjects are matters internal to the jury process. Tanner, 483 U.S. at 117-18; Virgin Islands, 759 at 1074-75. Accordingly, juror Peinado's post-trial declaration is inadmissible under Rule 606(b) for purposes of supporting petitioner's claim.

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The only remaining evidence submitted with respect to this claim by petitioner is juror Peinado's juror questionnaire and the declaration of Mr. Bernal. First, it is true that juror Peinado left several questions on the seventeen-page juror questionnaire unanswered, including question number five which asked if he had "any problem reading or speaking the English language?" (Am. Pet., Ex. F at 1; Opp'n & Cross-Mot. for Summ. J., Ex. Z at 1.) However, juror Peinado responded appropriately to other questions requiring more than basic English-language skills. For example he answered the following questions in the manner indicated:

> 30. How many years of formal schooling have you completed?
> Answer: 5
> . . . .
>
> 56. Do you or our spouse own a firearm?
> Answer: Yes
> If yes, what type?
> Answer: 30.6 chagan [sic]
> . . . .
>
> 73. Do you describe yourself as a follower or a leader?
> Answer: FOLLOWER

(Id. at 2-11.)

Likewise, as the following exchange suggests, during voir dire juror Peinado demonstrated a degree of competency in the English language.

> Q [Deputy District Attorney Druliner]: Do you recall the remarks made by the Court yesterday concerning this case?
>
> A [Peinado]: Yes, sir.
>
> Q: Did you follow along pretty well with what

the Court was saying?

A: Yes

Q: This case, as you now know, involves a charge, among other charges, but one of the charges is murder.
And the Court said with regard to Count Number One, that the charge is murder with two special circumstances.

A: (Nodding in the affirmative.)

Q: And it was not further described, but let me tell you, the special circumstances, what the allegations are concerning the murder, is that in 1984 a woman named Connie Decker was murdered during the course of a robbery of Mis Decker, okay?

A. Uh-huh. (In the affirmative.)

Q. Now you follow along with that?

A. Yeah.

. . . .

Q: My question is what are your feelings about the death penalty?

A: I say - - I don't know. Death.
It is, uh (pause) pretty bad. Very hard. But it would be necessary, I guess.

THE COURT: I'm sorry. I didn't hear the answer.

PROSPECTIVE JUROR PEINADO: I said if it necessary.

MR. FATHY: I believe he said if it is necessary, yes.

Q (By MR. DRULINER): If you were a juror, and we were in the penalty phase of the case, would you hear evidence presented on the subject of what the appropriate penalty should be?
Evidence would be presented.

A: (Nodded head.)

Q: And his Honor would describe for you the law.

A: (Nodded head.)

Q: Concerning what penalties are available.

A: (Nodded head.)

Q: Okay. But the judge would tell you, in those instructions, what things or what factors you could consider in arriving at your decision as to which penalty would be appropriate.
Do you understand that idea?

A: Yeah.

Q: That the Court would tell you the thing, the type of things that you could consider?

A: (Nodded head.)

Q: But the Court will not tell you which way to vote. Okay?

A: (Nodded head.)

Q: The vote, the choice as to which penalty would be appropriate, would be your choice. Yours and the choice of the other eleven jurors.
Would you be able to make that choice based on the evidence presented to you?

A: Yeah. Definitely.

(RT at 3186, 3190-91.)

Lastly, although Mr. Bernal's declaration raises concerns about juror Peinado's abilities with the English language, it does not constitute strong evidence of Mr. Peinado's incompetence to serve as a juror. "[T]he statutory qualifications for jurors require only a minimal competency in the English language." McDonough Power Equipment, Inc., 464 U.S. at 555. Accordingly, courts have generally denied post-verdict relief in non-habeas cases based on claims of juror incompetence due to limited English language skills. See

United States v. Gonzalez-Soberal, 109 F.3d 64, 69 (1st Cir. 1997) ("Although those portions of the transcript quoted suggest that the juror's command of the English language was less than that of a native speaker, they do not warrant the conclusion that the juror was unable to follow the proceedings or understand the evidence and therefore do not merit reversal."); United States v. Gray, 47 F.3d 1359, 1368 (4th Cir. 1995) (holding that juror's allegation that "eighty percent I know, just two percent confuse me," was not extraordinary or sufficient to show incompetence); United States v. Silverman, 449 F.2d 1341, 1344 (2nd Cir. 1971) (holding that juror's inability to read or write English was not prejudicial to the defendant where the juror had no difficulty understanding oral testimony). This same conclusion would be appropriate even were the court to consider juror Peinado's own post-trial declaration.

Finally, this court notes that as a result of the voir dire process, including the use of the juror questionnaire, petitioner's trial counsel and the trial court were aware that juror Peinado had some difficulty with the English language. (See RT at 4175.) Despite this knowledge petitioner's trial counsel elected not to challenge juror Peinado for cause and did not use a peremptory challenge to excuse him from petitioner's jury.

For all of these reasons the court will recommend that respondent's motion for summary judgment be granted as to this claim and that petitioner's cross-motion be denied.

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V. Jury's Consideration of Extraneous Evidence

In this claim, petitioner contends that the jury's consideration of extraneous evidence during both the guilt and penalty deliberations violated his constitutional rights. (Am. Pet. at 129.) Petitioner identifies six sources of extrinsic evidence to which at least one juror was exposed during deliberations: (1) a map drawn by some jurors; (2) a gun demonstration by the bailiff; (3) jurors' comments about petitioner's potential criminal conduct in the future and the trial and appellate courts' ability to overrule or overturn the jury's verdict; (4) a newspaper article concerning the parole of the so-called "Onion Field" killer; (5) a juror's consultations with ministers regarding the penalty phase verdict; and (6) a juror's comments about his feeling of remorse after killing someone in the line of duty. (Id. at 130-36.)

On habeas the petitioner bears the burden of establishing that extrinsic evidence had a substantial and injurious effect on the jury's verdict. Mancuso v. Olivarez, 292 F.3d 939, 949 (9th Cir. 2002); Rodriguez v. Marshall, 125 F.3d 739, 745 (9th Cir. 1997); Lawson v. Borg, 60 F.3d 608, 613 (9th Cir. 1995).[61] In Lawson, the court set forth the applicable legal standards as follows:

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[61] Were the matter on direct appeal rather than on collateral review, the government would appear to bear the burden of showing beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict. See United States v. Keating, 147 F.3d 895, 901-02 & n.3 (9th Cir. 1998); cf. Mach v. Stewart, 137 F.3d 630, 634 (9th Cir. 1998) (questioning whether the harmless error standard should be applied in the context of a claim that prejudicial extrinsic evidence was introduced by a juror during voir dire).

> Jury exposure to facts not in evidence deprives a defendant of the rights to confrontation, cross-examination and assistance of counsel embodied in the Sixth Amendment. Dickson v. Sullivan, 849 F.2d 403, 406 (9th Cir. 1988); see also Jeffries v. Blodgett, 5 F.3d 1180, 1191 (9th Cir. 1993) (introduction of extraneous prior bad acts evidence during deliberations constitutes error of constitutional proportions), cert. denied, 510 U.S. 1191, 114 S. Ct. 1294, 127 L. Ed.2d 647 (1994). However, a petitioner is entitled to habeas relief only if it can be established that the constitutional error had "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, ___ & n.9, 113 S. Ct. 1710, 1722 & n.9, 123 L. Ed.2d 353 (1993). Whether the constitutional error was harmless is not a factual determination entitled to the statutory presumption of correctness under 28 U.S.C. § 2254(d). Dickson, 849 F.2d at 405; Marino v. Vasquez, 812 F.2d 499, 504 (9th Cir. 1987). Therefore, we do not defer to the California Third Appellate District's finding that Lawson suffered no prejudice. . . .

Id. at 612.

In this vein, "[j]uror misconduct typically occurs when a member of the jury has introduced into its deliberations matter which was not in evidence or in the instructions." Thompson v. Borg, 74 F.3d 1571, 1574 (9th Cir. 1996). See also Rodriguez, 125 F.3d at 744; Marino v. Vasquez, 812 F.2d 499, 504 (9th Cir. 1997). The interest at stake is the constitutionally protected right to have the jury decide the case based on evidence subject to confrontation, cross-examination, and the assistance of counsel. See Jeffries v. Wood, 114 F.3d at 1490 ("When a juror communicates objective extrinsic facts regarding the defendant . . . to other jurors, the juror becomes an unsworn witness within the meaning of the Confrontation Clause."); Lawson, 60 F.3d at 612. A juror's personal knowledge or experience

constitutes extrinsic evidence when that juror has personal knowledge regarding the parties or issues involved in the litigation or where the juror interjects his or her past personal experiences into deliberations in the absence of any record evidence on a given fact. Mancuso, 292 F.3d at 951; Navarro-Garcia, 926 F.2d at 821-22; see also United States v. Swinton, 75 F.3d 374, 381 (8th Cir. 1996).

Several factors, none dispositive, are to be considered in determining whether the introduction of extrinsic evidence constitutes reversible error:

> (1) whether the extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and (5) any other matters which may bear on the issue of . . . whether the introduction of extrinsic material [substantially and injuriously] affected the verdict.

Mancuso, 292 F.3d at 951-52. See also United States v. Keating, 147 F.3d 895, 902 (9th Cir. 1998); Jeffries v. Blodgett, 5 F.3d 1180, 1190 (9th Cir. 1993). Additional factors falling within this fifth category that should be considered have been identified as well: (1) whether the prejudicial statement was ambiguously phrased; (2) whether the extraneous information was otherwise admissible or merely cumulative of other evidence adduced at trial; (3) whether a curative instruction was given or some other step taken to ameliorate the prejudice; (4) the trial context; and (5) whether the statement was insufficiently prejudicial given the issues and evidence in the case.

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Mancuso, 292 F.3d at 952; Keating, 147 F.3d at 902-03; Jeffries v. Wood, 114 F.3d at 1491-92.

As indicated by these various relevant factors, "[t]here is no bright line test for determining whether a defendant has suffered prejudice from an instance of juror misconduct." Rodriguez, 125 F.3d at 744 (citing Marino, 812 F.2d at 505). See also Mancuso, 292 F.3d at 950. However, in assessing a claim of prejudice in this context, the court is to place great weight on the nature of the extraneous information introduced into deliberations. See Mancuso, 292 F.3d at 950; Rodriguez, 125 F.3d at 744; Jeffries v. Wood, 114 F.3d at 1490 ("[T]he appropriate focus should be on the nature of the information itself."); Lawson, 60 F.3d at 612. "'[R]eversible error commonly occurs where there is a direct and rational connection between the extrinsic material and a prejudicial jury conclusion, and where the misconduct relates directly to a material aspect of the case."' Lawson, 60 F.3d at 612-13 (quoting Marino, 812 F.2d at 506). See also Mancuso, 292 F.3d at 953 ("Juror misconduct cases in which habeas relief has been granted often involve the jury's receipt of information excluded from trial as unduly prejudicial []."); Rodriguez, 125 F.3d at 744. (Id.) On the other hand, the introduction of cumulative extraneous material may render juror misconduct harmless. See Rodriguez, 125 F.3d at 744; Jeffries v. Wood, 114 F.3d at 1491.

Finally, in considering such a claim, a juror's testimony regarding the deliberative process or the subjective effects of the extraneous information cannot be considered by the court. See

Jeffries v. Wood, 114 F.3d at 1491 ("[j]urors' testimony that extrinsic evidence is not harmful is not controlling"); United States v. Maree, 934 F.2d 196, 201 (9th Cir. 1991); Hard, 870 F.2d at 1460. Rather, the reviewing court must apply an objective test in evaluating the potential impact of the evidence on the jury. See Mancuso, 292 F.3d at 953; Rodriguez, 125 F.3d at 744; Jeffries, 5 F.3d at 1191. Thus, the proper inquiry is whether there was a direct and rational connection between the extrinsic material and the prejudicial jury conclusion, and whether the misconduct relates directly to a material aspect of the case. See Mancuso, 292 F.3d at 953; Rodriguez, 125 F.3d at 744; Jeffries, 5 F.3d at 1190; Dickson v. Sullivan, 849 F.2d 403, 406 (9th Cir. 1988). Against these legal standards, the court will consider the parties' arguments and the facts underlying each aspect of petitioner's claim.

1. Map

Petitioner alleges that during the guilt phase deliberations jurors familiar with the crime scene locations and with the route allegedly used by petitioner, drew a map for at least one juror who was unfamiliar with the area. (Am. Pet. at 130.) Petitioner claims that this hand-drawn map was improper extraneous evidence and that it is likely that the map misled the jury into believing that petitioner had not reached a place of temporary safety before shooting Ms. Decker. (Id. at 130-31.)

In moving for summary judgment respondent argues generally that no aspect of this claim involves "extraneous influences" because in support of the claim petitioner is relying solely on evidence

relating to the jury's deliberative process. (Alt. Mot. for Summ. J. at 198-99.) In particular, respondent argues that the hand-drawn map was used to show the distance from the point where Ms. Decker was kidnapped to the scene of the murder[62], and that discussions of time and distance involved matters of common knowledge in the community. (Id. at 199.) Furthermore, according to respondent, evidence was introduced at trial showing the distance and driving times in question as well as to other locations involved in the crime. (Id.) Respondent contends that petitioner has failed to show that the jurors' hand-drawn map was inconsistent with the evidence introduced at trial or that consideration of the map by the jury was prejudicial. (Id. at 199-200.)

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[62] In a post-trial declaration submitted by petitioner Juror Curvin Hunt states:

> One thing that made it easier for me to understand the evidence was my familiarity with the crime scenes. Because I was a reservist in the Air Force, I knew the area around Mather Air Force Base, where the victim was killed, very well. I believe only one other juror was familiar with that crime scene because the area wasn't very developed at the time. But everyone on the jury, except for one person, was familiar with most of the other crime scenes. I remember some jurors drawing a map for that one juror, to make it easier to understand what happened. Because I was familiar with crime scenes, like the liquor store where the defendant picked up the victim, it was easy for me to imagine exactly how long the drive was from point to point, and what a horrible experience it must have been for the victim to sit in the car, probably at gunpoint the whole time.

(Am. Pet., Ex. M, ¶ 5; Opp'n & Cross-Mot. for Summ. J., Ex. O. ¶ 5.)

Petitioner opposes respondent's motion and contends that an evidentiary hearing is required on this issue.[63] In this regard, petitioner argues that consideration of the map was prejudicial because

> [t]he facts concerning petitioner's actions from the time he kidnaped the victim to the time the victim was killed were material to petitioner's defense that he had reached a place of temporary safety and that therefore the robbery had terminated for purposes of felony murder and the robbery special circumstance. There is at least grave doubt whether the map misled the jury into determining that petitioner had not reached a place of temporary safety and provided other false information about the route petitioner drove.

(Opp'n & Cross-Mot. for Summ. J. at 130.) Petitioner disputes respondent's argument that the map merely reflected matters of common knowledge in the community. (Id. at 131.) In addition, petitioner argues that the map was not cumulative of trial evidence. He asserts that the jurors must have believed the locations and distances were different than those reflected by the trial exhibits since they felt compelled to draw a map. (Id.)

Respondent's arguments are persuasive on this point. Petitioner has failed to demonstrate that the map exposed jurors to evidence not already introduced at trial. Prosecution witness Detective Robert Bell testified regarding People's Exhibits 44, a map of Rancho Cordova. (RT at 4873-74.) Detective Bell identified on that exhibit both the location where Ms. Decker's body was recovered and the location of the dumpster at 10631 White Rock Road. (RT at

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[63] Petitioner has not moved for summary judgment in his favor on this sub-claim.

4874-75). Using People's Exhibit 45, Detective Bell identified the locations of the other locations involved in petitioner's crimes and ultimate apprehension including Stewart's Liquor, Ms. Decker's house, the business known as Food and Liquor, and the petitioner's mother's residence. (RT at 4875-79.) In addition, Detective Bell testified regarding the distance from Stewart's Liquor to the Circle K store located at Mather Field Road and El Mercado, from the Circle K store to 10631 White Rock Road, and from White Rock Road and Zinfandel to where the body was recovered. (RT at 4880-83.)

Petitioner has not demonstrated that the map drawn by the jurors during their deliberation differed in any material respect from this evidence introduced at trial. Moreover, there has been no showing suggesting that the hand-drawn map had a substantial and injurious effect or influence in determining the jury's verdict. Therefore, respondent's motion for summary judgment should be granted as to this sub-claim.

2. Bailiff's Demonstration

Petitioner claims that during guilt phase deliberations, a juror asked the bailiff about the operation of the .32 caliber gun allegedly used by petitioner in the murder. (Am. Pet. at 131.) The bailiff demonstrated to the jurors how the gun was loaded and fired. (Id.) One juror commented that the .32 was not a common model. (Id.) According to petitioner, the ease with which the gun could be operated and its uncommon nature were material facts with respect to petitioner's defense. (Id. at 131-32.)

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In support of this sub-claim petitioner has submitted the post-trial declaration of juror Curvin Hunt wherein he states in relevant part:

> The bailiff was probably most helpful when he showed us how to operate the .32 caliber gun used by the defendant. We had the gun in the deliberations room, and I remember one of the women on the jury, during the guilt deliberations, raising a question about how the gun worked. The bailiff was very helpful and showed us exactly how to load and fire it. Even though I was very familiar with firearms from my military training, I didn't understand how a .32 caliber gun worked. The mechanism was complex, and not something I was used to. After the bailiff's demonstration, I remember thinking, and telling the other jurors, how it was unlikely that a gun as uncommon and complicated as a .32 would be carried by someone who didn't intend to use it.
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> I knew that a .32 does more damage than a .25, especially at close range, and that therefore it wasn't something someone would carry just for protection. I also knew from some of my police officer friends that it was more common for people on the streets to carry .25 calibers, which are cheap, fairly available, easy to shoot and easy to buy ammunition for. Given the defendant's choice of weapon, it was hard to believe the defense argument that the killing was simply a heat of the moment act committed by a drugged out man. During deliberation, we discussed the likelihood that the defendant premeditated and deliberated based on the fact that a .32 is very complicated to operate, is relatively hard to get ammunition for, and isn't the normal type of gun carried by the average street junkie.

(Am. Pet., Ex. M, ¶¶ 8-9; Opp'n & Cross-Mot. for Summ. J., Ex. O, ¶¶ 8-9.)

Respondent argues that petitioner's claim involves only the "ordinary manipulation of a trial exhibit" and that, in any event, there is no prejudice. (Alt. Mot. for Summ. J. at 200.) Respondent

contends that although juror Hunt may have thought the operation of the gun was complicated, the trial evidence does not suggest either that the gun was difficult to fire or had to already be loaded prior to the time the victim was shot. (Id. at 200-01.) Furthermore, the prosecutor did not argue that the ease or difficulty in loading the gun was relevant to premeditation. Rather, according to respondent, premeditation was established by the circumstances of the kidnapping, the victim's attempt to summon help, petitioner's motive of stealing the car and the fact that petitioner shot Ms. Decker twice in the head, "inferably taking careful aim separately for each shot." (Id. at 201.)

Petitioner disputes respondent's contention that the bailiff's demonstration was the ordinary manipulation of a trial exhibit. (Opp'n & Cross-Mot. for Summ. J. at 127.) Petitioner argues that the demonstration went to the essence of petitioner's defense to the first-degree charge. (Id. at 128.) "[T]he more complicated the gun was to operate, the less likely it was that petitioner's abilities were impaired as the result of his cocaine and heroin use at the time he killed the victim, Connie Decker." (Id.) Petitioner also disagrees with respondent's assertions that the gun was uncomplicated and was probably loaded and ready to fire when Ms. Decker was kidnapped. (Id. at 128-29.) Instead, petitioner argues that a reasonable interpretation of the jury's interaction with the bailiff is that some jurors found the operation of the gun to be relevant to petitioner's mental-state defense. (Id. at 129.) Petitioner argues that the jury's improper consideration of this extrinsic evidence had

a prejudicial impact on the jury's deliberations and that he is entitled to summary judgment in his favor as to this sub-claim. (Id.)

The court is not persuaded by respondent's argument that the bailiff's demonstration was merely an ordinary manipulation of a trial exhibit and that, in any event, petitioner suffered no prejudice from the jury's consideration of this information. The bailiff's demonstration would appear to be extraneous information since the operation of the gun was not demonstrated to the jury at trial and the jurors were apparently unable to determine how the gun was operated by examining it themselves. At least according to juror Hunt, an outside source (the bailiff) had to be consulted for that purpose. However, there are a number of questions left unanswered given the current state of the record. For instance, it is not clear: (1) to what extent the jury discussed or considered this extrinsic evidence; (2) when the bailiff's demonstration occurred during the jury's deliberation; (3) whether this information related directly to a material aspect of the defense; and (4) whether there are any other matters which may bear on the issue of whether the information had a substantial and injurious effect on the jury's verdict. See Mancuso, 292 F.3d at 951-52; Keating, 147 F.3d at 902; Jeffries v. Blodgett, 5 F.3d at 1190.

This sub-claim is not ripe for summary judgment at this time. Instead an evidentiary hearing may be necessary to resolve this claim. See United States v. Vasquez, 597 F.2d 192, 194 (9th Cir. 1979) (where bailiff left court files in the jury room exposing the jury to inadmissible evidence an evidentiary hearing was required to

ascertain the extent, if any, that jurors saw or discussed the prejudicial extrinsic evidence or other circumstances surrounding the jury breach). Accordingly, both motions for summary judgment should be denied in this respect.

3. Jury Comments

Petitioner next argues that during the penalty phase deliberations the jury considered the following information which was misleading, speculative and not based on evidence introduced at trial: (1) if petitioner were released from jail he might seek retribution against the jurors; (2) if petitioner were serving a life sentence without the possibility of parole he might commit crimes in prison; (3) that the trial judge could overrule the jury's penalty verdict if it was erroneous; and (4) that the death sentence could be overturned by a higher court. (Am. Pet. at 132-33.) In support of these allegations petitioner relies upon the post-trial declarations of several jurors. (Am. Pet., Exs. C, K, L, M & O ; Opp'n & Cross-Mot. for Summ. J., Exs. O, P, R, S & X.) Petitioner argues that the jury was prejudiced because it was led to believe that they did not have full responsibility for his sentence and because the extraneous information they considered in coming to that belief was incomplete and misleading. (Am. Pet. at 133.)

In moving for summary judgment respondent argues that these are matters of deliberation which are internal to the jury process and are immune from attack. (Alt. Mot. for Summ. J. at 201.) Respondent also argues that jurors could properly consider the possible consequences of their penalty phase decision in reaching a verdict.

(Id. at 202.) As for the trial judge's authority to overrule the jury's decision and a higher court's ability to overturn a death sentence, respondent argues that these are accurate propositions under the law. (Id.)

Petitioner argues that respondent has failed "to take into account that the jury's discussions were all completely speculative and unsupported by any evidence or arguments presented at the trial." (Opp'n & Cross-Mot. for Summ. J. at 132.) In addition, petitioner claims that respondent does not address the jury's belief that the trial judge could overrule their decision, and that the death sentence could be overturned on appeal. (Id.) Petitioner contends that these are not matters of common knowledge and that the jury's understanding was inaccurate because a California judge has no authority to overrule a jury's verdict imposing life without possibility of parole, and limited authority to overturn a death verdict. (Id.)

As discussed above with respect to claims D, T and U, under Federal Rule of Evidence 606(b), the admissibility of juror declarations turns on whether they concern matters external or internal to the jury process. Statements regarding matters that are internal to the jury process are not admissible. Hard, 870 F.2d at 1460. The post-trial juror declarations submitted by petitioner in support of this claim recount statements made during the deliberations and address the jurors' mental processes. These subjects are matters internal to the jury process. See Belmontes, 350 F.3d at 891 (habeas petitioner not entitled to relief on claim that the jury based its penalty decision on the view that life without parole did not

necessarily mean life in prison because this "concerns intrinsic jury processes"). The declarations do not present extraneous information. Accordingly, they are inadmissible under Rule 606(b).

Therefore, respondent's motion for summary judgment should be granted, and petitioner's cross-motion for summary judgment should be denied as to this sub-claim.

4. Newspaper

Petitioner alleges that during the trial and jury deliberations, a juror brought a newspaper into the jury room which was read by other jurors. (Am. Pet. at 134.) According to petitioner, on December 30, 1986, the front page of the Sacramento Bee bore the following banner headline, "State High court [sic] Orders Parole For 'Onion Field' Killer." (Id.) Petitioner argues that "[t]he possibility that petitioner's death sentence could be reversed, and the fact that he could be released on parole if given a life sentence were discussed by the jury during penalty phase deliberations, and played a substantial role in the penalty verdict." (Id.)

In support of this sub-claim petitioner relies on post-trial declarations of jurors Hunt and Lee but without specific citation. (Am. Pet. at 134-35.) In juror Hunt's declaration he states merely the following regarding the jury's exposure to a newspaper during the trial:

> We also occasionally worked on the crossword puzzle in the newspaper, and once we asked the bailiff if the judge was good at crossword puzzles. He responded that the judge didn't know the answers to the puzzle.

* * *

> The penalty deliberations seemed to drag on for quite a while. I remember someone bringing in a newspaper to the deliberations room. We passed it around, working on the crossword and reading the sports section. There wasn't anything about our case in the paper, but I do remember one article that had something to do with the police.

(Am. Pet., Ex. M, ¶¶ 7 & 13, 5-6; Opp'n & Cross-Mot. for Summ. J., Ex. O, ¶¶ 7 & 13.) In her declaration, juror Lee makes absolutely no mention of a newspaper. (Am. Pet., Ex. O; Opp'n & Cross-Mot. for Summ. J., Ex. P.)

Respondent argues that juror Hunt's declaration provides no evidence that the jury had before them the front page of the December 30, 1986, Sacramento Bee, or any other newspaper front page. (Alt. Mot. for Summ. J. at 202.) Furthermore, respondent argues that even if it could be speculated that the jurors saw the "Onion Field" killer article as alleged by petitioner, the jury was entitled to consider the possibility that petitioner might be released on parole in reaching its penalty phase verdict. (Id.)

In response petitioner argues that the evidence does not support summary judgment for either party as to this sub-claim. (Opp'n & Cross-Mot. for Summ. J. at 133.) Petitioner asserts that there is circumstantial evidence that jurors saw the newspaper article and that it impacted their consideration of a sentence of life without parole. (Id.) Petitioner argues that the jury could conclude based on the article that petitioner could be granted parole even if sentenced to life without the possibility of parole. (Id. at 134.) Petitioner also argues that, contrary to respondent's suggestion, in

California a jury may not consider the possibility that a capital defendant might be released in the future. (Id.)

The court finds that there is no evidence to support petitioner's allegation that the jurors had before them the front page of the December 30, 1986, issue of the Sacramento Bee with the headline and article regarding the parole of the "Onion Field" killer. The court is not persuaded by petitioner's argument that there is circumstantial evidence that jurors were exposed to the newspaper article in question. Petitioner's claim is based purely upon speculation and is unsupported by any evidence whatsoever.

Therefore, respondent's motion for summary judgment should be granted as to this sub-claim, and petitioner's cross-motion should be denied.

5. Consultations with Ministers

Petitioner claims that juror Abelardo Alvarado engaged in prejudicial misconduct by discussing petitioner's case with several ministers to confirm the propriety of voting to impose the death penalty and by informing the jury about the advice he received. (Am. Pet. at 135.)

Respondent argues that petitioner has not provided any evidence to support his allegation that "'religious leaders had approved the death sentence for Petitioner.'" (Alt. Mot. for Summ. J. at 203) (quoting Am. Pet. at 136.) Respondent also asserts that the juror's post-trial declarations filed in support of petitioner's state habeas petition are not admissible in these proceedings. (Resp't's Reply at 15-16.) As for juror Alvarado, respondent argues that his

discussions with ministers did nothing more than allow him to fulfill his oath as a juror in considering the two possible penalties without coming into conflict with the principles of his religion. (Alt. Mot. for Summ. J. at 203.)

In response, petitioner relies upon the post-trial declaration from juror Stephen McEnerney submitted in support of his second state habeas petition in which the juror states:

> I remember [juror Alvarado] telling us during the penalty deliberations that he had sought counseling from some ministers about his decision to vote for death. He suggested that we try the same if any of us were having trouble making up our minds.

(Opp'n & Cross-Mot. for Summ. J., Ex. T at 2.) Petitioner asserts that juror McEnerney's statements regarding the jury being exposed to extrinsic information from ministers are corroborated by the declarations of Linda Lye and Jeffrey Kim, both of whom state that they were present at a February 2, 1995, interview of juror Alvarado in which he recounted consulting with several ministers to help him feel comfortable with his penalty phase decision and how he shared that experience with other jurors. (Opp'n & Cross-Mot. for Summ. J., Ex. T at 2.)[64] Both Lye and Kim indicate that after providing this interview, juror Alvarado was unwilling to speak to them further and

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[64] In his supplemental memorandum following oral argument on the pending motions, petitioner argues that respondent never moved to strike these declarations and that they are either not hearsay or reflect statement against interest falling within an exception to the hearsay rule. (Suppl. Mem. at 4-5.)

thus they were unable to obtain a declaration from juror Alvarado himself with respect to this issue. (Id.)

Petitioner argues that juror Alvarado's ex parte consultations with ministers involved matters central to the jury's decision in petitioner's case. He asserts that in penalty phase deliberations a juror is required to make "a reasoned moral response" to the defendant's background, character, and crime. (Opp'n & Cross-Mot. for Summ. J. at 123-24.) Petitioner claims that "the moral, subjective nature of the task" makes ex parte contacts particularly serious when the outsider contacted is "a minister, a person who is generally understood to be an expert in moral decisions." (Id. at 124.)

Finally, petitioner argues that not only was juror Alvarado prejudiced as a result of this improper consultation with ministers but the jurors whom Alvarado talked to about his ex parte contacts were prejudiced as well. (Id.) According to petitioner, the outside advice juror Alvarado received and shared with the other jurors addressed the ultimate material aspect of the case because it involved the jury's life-or-death decision. (Id.) Thus, petitioner asserts, this extrinsic information was directly prejudicial to petitioner and likely had a substantial and injurious affect on the jury's penalty phase verdict. (Id. at 124-25.) Petitioner notes that there was a substantial and injurious impact on juror Alvarado because he sought such consultation despite his usual non-involvement in religious activities, and was clearly influenced by the advice because he shared the information with other jurors. (Id. at 125.) The fact that juror

Alvarado remembered his consultation with ministers nearly ten years after the trial and the fact that juror McEnerney also remembered the extrinsic information provided by juror Alvarado eight years later demonstrates, according to petitioner, that the extrinsic information was important to the deliberations. (Id.) Petitioner asserts that this jury misconduct requires that the penalty decision be vacated. (Id. at 126.)[65]

The court concludes that neither party is entitled to summary judgment on this sub-claim. Even if the court accepted as true petitioner's contention that juror Alvarado spoke to at least one minister and informed the jury that he had done so, there are many necessary questions left unanswered under the present record. For instance, it is not clear: (1) what advice, if any, juror Alvarado received and shared with the other jurors; (2) the extent of his extrajudicial contacts; (3) whether his conversations with ministers were purely philosophical or based on the facts of petitioner's case; (4) whether and to what extent juror Alvarado's statements were discussed by the other jurors; (5) the timing of juror Alvarado's comments in relation to the jury's deliberations and the return of the penalty phase verdict; and (6) whether there are any other matters

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[65] Petitioner contends that, contrary to respondent's position, the declarations relied upon by petitioner in support of this claim are part of the state court record and are properly considered by this court. (Pet'r's Reply at 28-30.) Petitioner also contends that respondent's suggestion that juror Alvarado has recanted his statement to petitioner's investigators must be rejected because on June 1, 2000 juror Alvarado reconfirmed that he did in fact have extrajudicial contact with clergy during petitioner's trial. (Id. at 32 and Exs. BBB, CCC.)

which may bear on the issue of whether the information had a substantial and injurious effect on the jury's verdict. See Mancuso, 292 F.3d at 951-52; Keating, 147 F.3d at 902; Jeffries v. Blodgett, 5 F.3d at 1190. Therefore, the court cannot find that either party is entitled to summary judgment at this time.

6. Remorse

Finally, petitioner again claims that during the penalty phase deliberations, one of the jurors disclosed that he had killed someone in the line of duty and that unlike petitioner, he had felt remorse. (Am. Pet. at 136.) In this claim petitioner asserts that the jurors comment constituted improper extrinsic information to which the jury should not have been exposed. In this vein he argues that because there was no evidence introduced at trial concerning petitioner's remorse or lack thereof, remorse was not a proper factor in the jury's determination of the appropriate penalty and such consideration made it easier for the jury to vote for death. (Id. at 137.) Petitioner again relies upon the post-trial declarations of two jurors to support this allegation. (Am. Pet., Exs. M at 5, O at 3; Opp'n to Mot. for Summ. J. & Cross-Mot. for Summ. J., Ex. O at 5; P at 3.)

Respondent argues that this is an intrinsic matter of deliberation and that the juror's disclosure of his involvement in a killing was nothing more than an expression of common knowledge that someone involved in taking a life normally feels some remorse. (Alt. Mot. for Summ. J. at 203.) Respondent argues that a juror's sharing of past personal experiences is an appropriate part of jury

deliberation. (Id.) Lastly, respondent argues that the juror's statement was not prejudicial and "concerned a normal human reaction, which was well within the range of common experience." (Id. at 205.)

As discussed above, the admissibility of a juror declaration turns on whether the declaration concerns matters external or internal to the jury process. Statements regarding matters that are internal to the jury process are not admissible. Hard, 870 F.2d at 1460. The post-trial juror declaration submitted by petitioner in support of this claim address statements made during the deliberations concerning the jurors' mental processes. These subjects are matters internal to the jury process. See Belmontes, 350 F.3d at 891 (habeas petitioner not entitled to relief on claim that the jury based its penalty decision on the view that life without parole did not mean necessarily mean life in prison because this "concerns intrinsic jury processes"). Because the declarations relied upon by petitioner in support of this sub-claim do not address the jury's consideration of extraneous information, they are inadmissible under Rule 606(b).

Moreover, jurors may rely on their past experiences in reaching a decision and in doing so they are not improperly considering extrinsic evidence. Price, 200 F.3d at 1255; Hard, 812 F.2d at 486. Finally, as previously noted, a defendant's courtroom demeanor is evidence that a jury may properly consider. Williams, 52 F.3d at 1483; Schuler, 813 F.2d at 981 n.3; see also Bates, 308 F.3d at 421.

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For all of these reasons respondent's motion for summary judgment should be granted as to this sub-claim and petitioner's cross-motion for summary judgment should be denied.

W. Ineffective Assistance of Counsel/Petitioner's Mental Condition, Family History, Upbringing and Injuries

This claim has been fully addressed in section, C, supra with the court concluding that the cross-motions for summary judgment should be denied.

X. Cumulative Error

Petitioner claims that the cumulative effect of the errors at both the guilt and penalty phases of his trial denied him his constitutional rights to a fair trial on the issue of guilt or innocence and a fair, reliable, individualized and adequately-guided determination of the appropriateness of the death penalty.

Respondent moves for summary judgment on this claim on the grounds that petitioner has failed to establish either any error sufficiently substantial to generate the accumulation of prejudicial error or an undermining of the adversarial process. Respondent concludes by arguing that summary judgment on this claim is appropriate because "[t]he fact that many claims . . . are pressed does not alter fundamental math - a string of zeros still adds up to zero." (Alt. Mot. for Summ. J. at 210) (quoting Hunt v. Smith, 856 F. Supp. 251, 258 (D. Md. 1994), aff'd, 57 F.3d 1327 (4th Cir. 1995)).

Where asserted constitutional errors have been established, but findings of no prejudice as to the individual errors are made, the errors en toto may nonetheless present a claim for cumulative error

sufficient to overturn a death sentence. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Tucker, 716 F.2d 576, 595 (9th Cir. 1983). Moreover, while individual errors looked at separately may not rise to the level of constitutional error, the cumulative effect of such errors may so prejudice the defendant's right to a fair trial that reversal is warranted. See United States v. Berry, 627 F.2d 193, 200-01 & n.7 (9th Cir. 1980); see also United States v. Nadler, 698 F.2d 995, 1002 (9th Cir. 1983).

Because the court is recommending denial of summary judgment on petitioner's ineffective assistance and other claims, it indeed appears that summary judgment on the cumulative error claims would be premature. See Mak, 970 F.2d at 622 (prejudice in ineffective assistance claims may be found from consideration of "the totality of counsel's errors and omissions"). Therefore, respondent's motion for summary judgment should be denied as to this claim.

CONCLUSION

For the reasons set forth above, the court HEREBY RECOMMENDS that:

1. Respondent's motion for summary judgment or to dismiss be granted in part and denied in part.

2. Summary judgment be granted in respondent's favor on the following claims A, B, D, E, F, G, H, I, J, K, M, P, Q, R, S (except as to sub-claim S-5), T (in part), U, and V (in part).

3. Respondent's motion be denied with respect to the following claims: C, L, N, O, S-5, T (in part), V (in part), W and X.

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4. Petitioner's cross-motion for summary judgment be denied in its entirety.

5. That claim Q be dismissed for failure to state a claim.

6. Respondent be ordered to file an answer to the remaining claims of the second amended federal petition within sixty days after the district court's ruling with respect to these findings and recommendations, after which time the undersigned will set a status conference to schedule the remaining proceedings in this litigation.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within thirty days after being served with these findings and recommendations, any party may file written objections with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations" and shall not exceed fifty pages in length. Any reply to the objections shall be served and filed within fifteen days after service of the objections and shall not exceed twenty pages in length. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: January 6, 2004.

Dale A. Drozd

DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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breauxsjf&r

mdp

United States District Court
for the
Eastern District of California
January 6, 2004

* * CERTIFICATE OF SERVICE * *

2:93-cv-00570

Breaux

v.

Vasquez

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on January 6, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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